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A Most Valuable Acquisition to every
Lawyer, Real Estate Owner and
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THE GREAT LEGAL WORK.

BLACKWELL ON TAX TITLES.

A Practical Treatise on the Power to Sell Land for the Non-Payment of Taxes Affected thereon, embracing the decisions of the Federal Courts, and of the Supreme Judicial Tribunals of the several States. By ROBERT S. BLACKWELL, Esq., of the Chicago Bar. One Vol., 8 vo., about 800 pages. Price \$5.50.

From the numerous letters which we have received from persons highly qualified to judge of the merits of the work, we make the following extracts:

ILLINOIS.

From Hon. J. D. Caton.

"I have perused with attention the early sheets of BLACKWELL ON TAX TITLES. You have arranged your subject in an admirable and philosophical manner. Your extensive practice and great familiarity with the subject of which you treat, have eminently qualified you for the task you have undertaken. I am satisfied you have done yourself and your subject eminent justice. The want of a practical treatise on the subject of Tax Titles has long been felt by the profession, especially in the Western States. By accomplishing your task with the same fidelity and industry which is indicated in that portion which I have examined, you will have rendered an invaluable service to both the bench and the bar. No Law Library can be considered complete without your work. The mechanical execution of the work is such as leaves nothing to be desired in that department."

From Hon. O. C. Skinner.

"It seems to me the book is one of great practical utility, and demanded at this period by the wants of the profession. The fact alone that it gives complete reference to all the leading adjudications upon the vexed questions arising out of Titles derived under Tax Sales, renders the work peculiarly valuable, and the matter of the text appears highly creditable to the profession and to the author."

From Hon. S. H. Treat.

"I have examined Mr. BLACKWELL'S TREATISE ON TAX TITLES, and regard it as a valuable work, and well worthy the patronage of the profession."

From Hon. D. M. Woodson.

"As far as I can judge of the work, I regard it as one of great merit. It treats on a subject of much interest to the American Lawyer, and must doubtless meet with that favor from the profession which it deserves. Such a work is greatly needed, and the author is entitled to the thanks of the legal profession for the labor which he has bestowed on a branch of the law to which but little attention has been directed."

From Hon. John M. Wilson.

"I have examined with care Mr. BLACKWELL'S TREATISE ON TAX TITLES, and am confident that it will fully meet the expectations of the profession even in the West where his reputation as an able lawyer is best known. His extensive practice in cases involving the investigation of questions applicable to this branch of the law has enabled him to present the subject in a manner eminently practical.

The arrangement of the subject is perspicuous and the citations of authorities upon all the main topics are full, and embrace all the cases bearing upon the several points discussed; the subject is one of great and increasing importance, and this is the first effort to bring order out of apparent chaos, of decisions scattered through the numerous American Reports. I have no doubt that his book will compare favorably with the best and most popular law treatises."

From Chief Justice Scates.

"A digest of the laws and principles settled by the construction of them by the many decisions of Great Britain and the federal and state courts, scattered through so many volumes of laws and reports, had become necessary to the profession. I highly approve the undertaking, and am pleased to find embraced within the plan of your work such thoroughness and completeness in tracing the subject from first principles *through all its nice and difficult distinctions*, from the source of the power to a valid title under it.

Judging of the whole work by the chapters I have examined, your labors will supply a pressing want of the profession, and will, I have no doubt, meet their approbation and encouragement as they deserve."

From Hon. Thomas Drummond.

"I understand that you have in press and are soon to publish a work on the "Power to sell land for non-payment of taxes," by R. S. Blackwell of this city. My official duties have caused me to become somewhat familiar with the subject treated by Mr. Blackwell, as I have been called on to decide numerous cases upon that branch of the law within the last few years. I was much gratified to learn that he was preparing a work on that subject for the press. It has grown to be a very important branch of the law, particularly in the Western States, and I am confident the work of Mr. Blackwell will greatly facilitate the labors of the bench and the bar in cases involving the questions treated by him. I have had an opportunity of examining the work in its progress through the press, and I am much pleased with the manner in which Mr. B. has discharged the duty he has taken upon himself. The subject appears to be arranged with clearness, and discussed with learning and ability. Allow me to add, in conclusion, that you are producing the book in a style that is exceedingly creditable to your house."

From Hon. R. S. Wilson.

"This work I am sure will be of great service to the practitioner, and it will in my opinion furnish the student with *more useful knowledge* than can be obtained within the lids of work containing the same number of pages. It will unquestionably be a popular and useful book in every State in the Union."

From Hon. David Davis.

"I am happy to bear my testimony to the merits of your forthcoming work on Tax Titles, so far as I am able to judge from the chapters which you were kind enough to send me. The decisions of our courts on the subject of Tax and Tax Sales are scattered through a great number of volumes, and thereby rendered in a measure inaccessible to the great majority of the profession in the Western States.

A book bringing together those decisions with the laws on which they are founded, and giving the references to them must, prove eminently useful to the bar of this country. Every lawyer and in fact every business man who is engaged in real estate transactions, needs the work, and will certainly procure a copy. I trust that a discerning and liberal profession will amply repay you for the time and labor bestowed in the preparation of your book."

From Hon. Norman H. Purple.

"I have examined the three first chapters of your work on Tax Titles; furnishing, as the same is designed to do, to the profession, a ready reference to all the laws and decisions, with a brief and lucid abstract of the same, in relation to Taxes and Tax Sales, in the United States. It must prove highly useful and beneficial to the legal profession at home and abroad, and indispensable to such as are extensively engaged in the investigation of titles to real estate. I take great pleasure in recommending it to the public."

From Isaac N. Arnold, Esq.

"I have been highly gratified in looking over several chapters of your "Practical treatise on the power to sell land, &c." It is a book which supplies a want felt more and more by the profession, and which will relieve all who have any thing to do with investigations connected with Tax Titles from much labor. Its possession by me during the past year would have saved me *weeks of labor*. I think the execution of the work highly creditable to yourself; exhibiting great research, industry and accuracy, and nice discrimination in statement of cases. In the production of this work, I think you have honorably discharged the "debt which," as Lord Coke says, "every man owes to his profession."

From Hon. Ebenezer Peck. (State Reporter.)

"It is a treatise of much merit, prepared with great care, and carries with it evidence of study and learning. The book will make a valuable addition to the library of every western lawyer, and in truth to the library of every lawyer who desires to be well informed upon the subjects of which Mr. Blackwell treats. The mechanical execution of the work is superior and will do credit to yourselves as publishers."

From Hon. P. H. Walker.

"I feel no hesitation in saying that I regard it a very valuable addition to the present stock of our legal learning. I think it will prove highly valuable to both the student and practitioner. It seems to cover the entire subject, and is very complete in its arrangement. Such a work has been greatly needed and its appearance will be highly acceptable to the profession."

MARYLAND.

From Chief Justice R. B. Taney.

Chief Justice Taney received specimen sheets of the work while indisposed, at "Old Point Comfort;" he therefore was unable to give the work more than a cursory examination. He writes as follows:

"So far as I looked into it, my opinion was a favorable one, and certainly a work on that subject is very desirable."

OHIO.

From Hon. John McLean.

"I am very favorably impressed with the work. Such a treatise was much needed, not only in the Western States where lands are frequently sold for taxes, but also for land holders in the West who reside in other parts of the Union.

I have no doubt that it will not only be extensively useful, but very creditable to the author. The manner in which the book has been printed, does credit to the publishers and the press of Chicago."

From Hon. W. Y. Gholson.

"The portions of Mr. BLACKWELL'S TREATISE ON TAX TITLES, which you were so kind as to send me have been examined. It is an able and very carefully prepared work, and promises entirely to exhaust the subject; much labor must have been bestowed on the examination of the cases having any bearing on the subject discussed, and I must confess that I am surprised they were found to be so numerous. The work when completed will be a most valuable aid to all whose business or researches lead them into an investigation of the questions discussed. The mode in which the work has been got up is creditable to the arts in your city."

MISSOURI.

From the Hon. John M. Krum, St. Louis.

"I have read with great interest and satisfaction BLACKWELL'S TREATISE ON TAX TITLES, which you were so kind as to send me, as the work was going through the press.

Having myself given this subject more than ordinary study and attention during the last fifteen years, I was the more anxious to see this work when its publication was announced.

In my judgment the author has succeeded well in presenting his subject in clear and vigorous language, and with marked perspicuity and point. He has succeeded equally well in stating the facts and the points decided in the many Tax Title Cases that have been adjudicated in the several courts of the United States, and which are reviewed in the text.

This feature in the work renders it a most valuable acquisition to every practicing lawyer."

INDIANA.

From Hon. S. E. Perkins.

"I have looked with some care through BLACKWELL ON TAX TITLES, and am pleased with the work.

The branch of the law treated of, is sufficiently important and extensive to be made the subject of a volume, and is, I judge, systematically and thoroughly examined by Mr. B. The work will be of great practical value to the profession, and should, and I have no doubt will, meet with an extensive sale.

I am satisfied it will take its place among our standard text books, along side of Angel & Ames' Corporations, "Sedgwick on damages," &c."

VIRGINIA.

From Hon. Andrew Johnston.

"I have read attentively the first sheets of BLACKWELL ON TAX TITLES. Such a work is very much needed by the bar; being the first attempt, so far as I know, to digest in a separate treatise the cases and doctrines belonging to a subject of great and increasing importance. I have no doubt Mr. Blackwell's undertaking will prove an essential service to the profession, and confirm the reputation he has already acquired."

WISCONSIN.

From Hon. Levi Hubbell.

"I have noticed with much pleasure, your announcement, of a work in press entitled "Blackwell on Tax Titles." From an examination of the advance sheets, I am satisfied it will prove a work of merit and prove extensively serviceable to the bench and the bar. If the work is completed in accordance with the prospectus, Mr. B. will have admirably cultivated a new field of professional reputation."

NEW JERSEY.

From Hon. B. Williamson.

"The work is one which has been greatly needed by the profession. The collection of the scattered authorities upon the subject of the treatise would of itself make this a most acceptable work both to the bench and the bar. It has, however, much more merit than this; and I am sure the author will receive, as he deserves, a suitable return for his own valuable labors by which he has so much abbreviated the labors of others, and supplied a deficiency in the library of the lawyer."

MICHIGAN.

An eminent lawyer in Michigan, who has received the work in sheets as it came out, thus writes:

"I have received from you, and read with equal pleasure and profit the first eleven chapters of "Blackwell on Tax Titles."

It has long been matter of astonishment to me that so important a subject as that of Titles to Real Estate under sales for Taxes, should remain so entirely unnoticed by commentators on American Law. While every freeholder in the country is interested in knowing what are the safeguards which the law throws around his property, and how strictly those must be regarded by officers who would punish his neglect of duty by the forfeiture of his estate, while the

title to millions of acres is yearly being transferred or attempted by law to be transferred from those who have bought in good faith and for a full consideration to speculators who pay a nominal price only, and while every municipal corporation has a vital interest in the question of the validity of tax sales, by the aid of which alone it can maintain its revenues—this great branch of American Jurisprudence has scarcely received the passing notice of authors, and the lawyer who would make himself familiar with it, has been obliged to wade through series after series of reports, collect the scattered cases, examine them in the light of the various statutes affecting them, and with great labor sift the grains of correct doctrine from the conflicting decisions.

Rejoicing, therefore, to learn that Mr. Blackwell was engaged in the work of bringing together and analysing the American decisions on Tax questions, I assure you that I was both surprised and delighted to find his Treatise so clear in its statements of fundamental principles, so comprehensive in its plan, and so complete in its collection of authorities as the first portion shows it to be. That this great professional want should be at once so completely supplied, was more than we could reasonably have hoped, and Mr. Blackwell has well earned the thanks of the profession, and the high reputation he is certain to attain by bringing a well-disciplined mind and a large experience to the elucidation of this subject."

ALABAMA.

From Hon. W. P. Chilton.

"I am in receipt of some of the early sheets of Mr. Blackwell's work on Tax Titles, which you did me the honor to forward. From the specimen I feel confident the work will be highly acceptable to the legal profession, as it is the only one exclusively devoted to this branch of the law. The author appears to have bestowed much care and labor to make it accurate, and well deserves the gratitude of his professional brethren. I have no doubt the publishers will find for it a very ready sale."

SOUTH CAROLINA.

From Hon. Job Johnston.

"I have as you desired examined with such attention as my business allowed, portions of Blackwell on Tax Titles issued from your press, and am quite pleased with them.

Judging from the research into authorities, the clearness of exposition, and the soundness of reasoning manifested in the chapters already out, and the subjects indicated in the table of contents, I shall expect the work when completed to rank well among American judicial publications.

The subject of the taxing power considered as a matter of law, is well handled, and the investigation of what is intended by the phrase *Lex Terræ* is uncommonly extensive and able. If the remainder shall correspond in excellence with what I have seen, this work will, in my opinion, establish a high reputation for its author."

From Hon. John Belton O'Neale.

"I received a few days ago your favor, together with "Blackwell on Tax Titles." I have read the work with attention, and am much pleased with the plan and the contents."

GEORGIA.

From Hon. E. A. Nesbet.

"I am in receipt of some of the early sheets of "Blackwell on Tax Titles," which you propose soon to publish. I have looked into the work, and find it written with precision and accuracy, and its positions sustained by copious references. The title really has no place in the elementary books of the profession. Such a treatise is a professional want. It will be useful more especially in our new States. That it will be successful I have no doubt."

A *D. May*

✓ PRACTICAL TREATISE

ON THE

POWER TO SELL LAND

FOR THE

NON-PAYMENT OF TAXES

ASSESSED THEREON,

EMBRACING

THE DECISIONS OF THE FEDERAL COURTS, AND OF THE SUPREME
JUDICIAL TRIBUNALS OF THE SEVERAL STATES.

BY

ROBERT S. BLACKWELL,
OF THE ILLINOIS BAR.

THE ILLINOIS BAR

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SCOTT & FULTON, PRINTERS,
CHICAGO.

TO

ARCHIBALD WILLIAMS, ESQ.,

LATE UNITED STATES ATTORNEY FOR THE DISTRICT OF ILLINOIS:

AN ABLE LAWYER,

THE PIONEER IN TAX TITLE LITIGATION IN
ILLINOIS, AND WHO, BY HIS ADVICE AND ENCOURAGEMENT,
HAS MATERIALLY AIDED IN THE PREPARATION OF THIS WORK, AND
FOR WHOM THE AUTHOR ENTERTAINS THE HIGHEST SENTIMENTS
OF RESPECT AND FRIENDSHIP,

THIS BOOK IS DEDICATED.



TO THE READER.

That errors — grammatical, typographical, and technical — exist in this work, is undeniable. These will be corrected in the second edition. In the meantime, the author begs leave to say, that no error has occurred which does not carry along with it its own correction. For this reason, he omits the usual enumeration of errors. In behalf of the printers, he takes pleasure in saying, that their accuracy is unprecedented.

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Addison,	Pennsylvania,	Addis. R.
Adams,	New Hampshire,	N. H. R.
Aiken,	Vermont,	Aik. R.
Alabama or Minor,	Alabama,	Cited as Minor.
Alabama, N. S.	Alabama,	Ala. R.
Appleton,	Maine,	App. R.
Ashmead,	Pennsylvania,	Ashm. R.
Bailey,	South Carolina,	Bail. R.
Bailey's Chancery,	South Carolina,	Bail. C. R.
Baldwin,	U. S. Circuit,	Balw. R.
Barbour,	New York,	Barb. S. C. R.
Barbour's Chancery,	New York,	Barb. C. R.
Barr,	Pennsylvania,	Barr R.
Bay,	South Carolina,	Bay R.
Bibb,	Kentucky,	Bibb R.
Binney,	Pennsylvania,	Rin. R.
Blackford,	Indiana,	Blackf. R.
Bland's Chancery,	Maryland,	Bland's Ch. R.
Blatchford,	U. S. Circuit Court,	Blatchf. R.
Brayton,	Vermont,	Brayt. R.
Breese,	Illinois,	Bre. R.
Brevard,	South Carolina,	Brev. R.
Brockenbrough,	U. S. Circuit,	Brock. R.
Caines',	New York,	Caines' R.
Caines' Cases in Error.	New York,	Caines' Cas.
California,	California,	Cal. R.
Call,	Virginia,	Call R.
Carolina Law Repository,	North Carolina,	Car. Law Rep.
Cameron & Norwood,	North Carolina,	Cam. & Norw. R.
Carter,	Indiana,	Carter R.
Chandler,	Wisconsin,	Chand. R.
Charlton, (T. U. P.)	Georgia,	Charl. R.
Charlton, (R. M.)	Georgia,	R. M. Charl.
Cheves' Chancery Cases,	South Carolina,	Che. Ch. Ca.
Chipman, (N.)	Vermont,	Chimp. R.
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Clarke's (Vice Chancellor),	New York,	Clarke R.
Cobb,	Georgia,	Geo. R.
Coleman & Caines' Cases	New York,	Col. & Cai. Cas.
Comstock,	New York,	Comst. R.
Conference,	North Carolina,	Conf. R.
Connecticut,	Connecticut,	Conn. R.
Constitutional Court.	South Carolina,	Const. Ct. R.

NAME OF REPORTER.	STATE.	ABBREVIATION.
Cooke,	Tennessee,	Cooke R.
Cowen,	New York,	Cow. R.
Coxe,	New Jersey,	Coxe R.
Crabbe,	U. S. Circuit,	Crabbe R.
Cranch,	U. S. Supreme Court,	Cra. R.
Cushing,	Massachusetts,	Cush. R.
Cushman,	Mississippi,	Cushm. R.
Dallas,	Pennsylvania,	Dall. R.
Dana,	Kentucky,	Dana R.
Day,	Connecticut,	Day R.
Denio,	New York,	Denio R.
Desaussure,	South Carolina,	Desaus. R.
Devereux's Equity,	North Carolina,	Dev. Eq. R.
Devereux's Law,	North Carolina,	Dev. R.
Devereux & Battle,	North Carolina,	Dev. & Bat. R.
Devereux & Battle's Equity,	North Carolina,	Dev. & Bat. Eq. R.
Douglass,	Michigan,	Doug. (Mich.) R.
Dudley,	Georgia,	Dudl. R.
Dudley's Law,	South Carolina,	Dudl. Law R.
Dudley's Equity,	South Carolina,	Dudl. Eq. R.
Edwards' Chancery,	New York,	Edw. Ch. R.
English,	Arkansas,	Eng. R.
Fairfield,	Maine,	Fairf. R.
Florida,	Florida,	Fla. R.
Foster,	New Hampshire,	Foster R.
Freeman's Chancery,	Mississippi,	Freem. C. R.
Gallison,	U. S. Circuit,	Gal. R.
Gibbs,	Michigan,	Gibbs R.
Gill,	Maryland,	Gill R.
Georgia Reports,	Georgia,	Geo. R.
Gill & Johnson,	Maryland,	G. & J. R.
Gilman,	Illinois,	Gilm. R.
Gilmer,	Virginia,	Gilmer R.
Gilpin,	U. S. Circuit, E. Dis., Pa.,	Gilp. R.
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Halsted Chancery,	New Jersey,	Halst. C. R.
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Harper's Equity,	South Carolina,	Harp. Eq. R.
Harrington,	Delaware,	Harr. R.
Harris,	Pennsylvania,	Pa. State R.
Harris & Gill,	Maryland,	H. & G. R.
Harris & Johnson,	Maryland,	H. & J. R.
Harris & McHenry,	Maryland,	H. & McH. R.
Harrison,	New Jersey,	Harrison R.
Hawks,	North Carolina,	Hawks R.
Haywood,	North Carolina,	Hayw. R.
Henning & Munford,	Virginia,	Hen. & Munf. R.
Heywood,	Tennessee,	Heyw. R.
Hill,	New York,	Hill N. Y. R.
Hill,	South Carolina,	Hill S. C. R.
Hill's Chancery,	South Carolina,	Hill's C. R.
Hoffman,	New York,	Hoffm. R.
Hopkins' Chancery,	New York,	Hopk. R.

NAME OF REPORTER.	STATE.	ABBREVIATION.
Howard,	Mississippi,	How. R.
Howard,	U. S. Supreme Court,	How. U. S. R.
Hughes,	Kentucky,	Hughes R.
Humphrey,	Tennessee,	Humph. R.
Illinois Reports by E. Peck,	Illinois,	Ill. R.
Iredell's Law,	North Carolina,	Ire. R.
Iredell's Equity,	North Carolina,	Ire. Eq. R.
Jefferson,	Virginia,	Jef. R.
Jones,	Pennsylvania,	Pa. State R.
Johnson,	New York,	John. R.
Johnson's Cases,	New York,	John. Cas.
Johnson's Chancery,	New York,	John. Ch. R.
Kelly,	Georgia,	Kelly R.
Kentucky Decisions,	Kentucky,	Print. Dec.
Kirby,	Connecticut,	Kirby R.
Leigh,	Virginia,	Leigh R.
Littell,	Kentucky,	Litt. R.
Littell's Select Cases,	Kentucky,	Litt. Sel. Ca.
Louisiana,	Louisiana,	Lou. R.
Louisiana Annual R.	Louisiana,	Lou. An. R.
Maine,	Maine,	Me. R.
Manning,	Michigan,	Mann. R.
Martin,	North Carolina,	Martin N. C. R.
Martin,	Louisiana,	Martin Lou. R.
Martin & Yerger,	Tennessee,	M. & Y. R.
Marshall, (A. K.)	Kentucky,	A. K. Mar. R.
Marshall, (J. J.)	Kentucky,	J. J. Mar. R.
Mason,	U. S. 1st Circuit Court,	Mason R.
Massachusetts,	Massachusetts,	Mass. R.
Maryland Reports,	Maryland,	Md. R.
Maryland Chancery,	Maryland,	Md. Ch. Decis.
M'Cord,	South Carolina,	M'Cord R.
M'Cord's Chancery,	South Carolina,	M'Cord Ch. R.
M'Lean,	U. S. 7th Circuit Court,	M'Lean R.
M'Mullan,	South Carolina,	M'Mul. R.
M'Mullan's Chancery,	South Carolina,	M'Mul. Ch. R.
Meigs,	Tennessee,	Meigs R.
Metcalf,	Massachusetts,	Metc. R.
Mississippi,	Mississippi,	Miss. R.
Minor,	Alabama,	Minor R.
Missouri,	Missouri,	Mis. R.
Monroe, Thomas	Kentucky,	Mon. R.
Monroe, Benjamin,	Kentucky,	B. Mon. R.
Morris,	Iowa,	Morris R.
Munford,	Virginia,	Munf. R.
Murphy,	North Carolina,	Murphy, R.
New Hampshire,	New Hampshire,	N. H. R.
New Jersey,	New Jersey,	N. J. R.
Nott & M'Cord,	South Carolina,	N. & M'C. R.
Ohio,	Ohio,	Ohio R.
Overton,	Tennessee,	Overt R.
Paige,	New York,	Paige R.
Paine,	U. S. Circuit,	Paine R.
Peck,	Tennessee,	Peck R.
Peck,	Illinois,	Ill. R.
Pennington,	New Jersey,	Penning. R.
Pennsylvania,	Pennsylvania,	Pa. R.
Penrose & Watts,	Pennsylvania,	Penr. & W. R.
Peters' Circuit Court,	U. S. 3rd Circuit Court,	Pet. C. C. R.
Peters,	U. S. Supreme Court,	Pet. R.
Peters' U. S. Condensed.	Supreme Court U. S.	Pet. Cond. R.
Pike,	Arkansas,	Pike R.

NAME OF REPORTER.	STATE.	ABBREVIATION.
Pickering,	Massachusetts,	Pick. R.
Porter,	Alabama,	Port. R.
Porter,	Indiana,	Port. Ia. R.
Randolph,	Virginia,	Rand. R.
Rawle,	Pennsylvania,	Rawle R.
Rice,	South Carolina,	Rice R.
Rice's Equity,	South Carolina,	Rice Eq. R.
Richardson's Law,	South Carolina,	Rich. R.
Richardson's Equity,	South Carolina,	Rich. Eq. R.
Riley's Chancery Cases,	South Carolina,	Riley Ch. Ca.
Riley's Law Cases,	South Carolina,	Riley Law Ca.
Robinson,	Virginia,	Rob. Va. R.
Robinson,	Louisiana,	Rob. Lou. R.
Root,	Connecticut,	Root R.
Sanford's Chancery,	New York,	Sandf. Ch. R.
Sanford's Sup. Court,	New York,	Sandf. S. C. R.
Saxton's Chancery,	New Jersey,	Saxton C. R.
Scammon,	Illinois,	Scam. R.
Selden,	New York,	Selden R.
Sergeant & Rawle,	Pennsylvania,	S. & R.
Shepley,	Maine,	Shep. R.
Slade,	Vermont,	Vt. R.
Smedes & Marshall,	Mississippi,	S. & M.
Smedes & Marshall's Chanc'y	Mississippi,	S. & M. Ch. R.
Smith,	Indiana,	Smith R.
Southard,	New Jersey,	South. R.
South Carolina,	South Carolina,	S. C. R.
Spear,	South Carolina,	Spear R.
Spear's Equity,	South Carolina,	Spear Eq. R.
Spencer,	New Jersey,	Spencer R.
Stanton,	Ohio,	Ohio.
Stewart,	Alabama,	Stew. R.
Stewart & Porter,	Alabama,	S. & P. R.
Story,	U. S. 1st Circuit Court,	Story R.
Strobbart,	South Carolina,	Strobb. R.
Strobbart's Chancery,	South Carolina,	Strobb. Ch. R.
Summer,	U. S. 1st Circuit Court,	Sum. R.
Taylor,	North Carolina,	Taylor N. C. R.
Tennessee,	Tennessee,	Tenn. R.
Texas,	Texas,	Texas R.
Tyler,	Vermont,	Tyler R.
Vermont,	Vermont,	Vt. R.
Virginia Cases,	Virginia,	Va. Ca.
Walker,	Mississippi,	Walk. R.
Wallace,	U. S. Circuit,	Wal. R.
Walker's Chancery,	Michigan,	Walk. Ch. R.
Washburn,	Vermont,	Vt. R.
Washington Circuit Court,	U. S. 3rd Circuit Court,	Wash. C. C. R.
Washington,	Virginia,	Wash. Va. R.
Watts,	Pennsylvania,	Watts R.
Watts & Sergeant,	Pennsylvania,	W. & S.
Wendell,	New York,	Wend. R.
Weston,	Vermont,	Vt. R.
Wharton,	Pennsylvania,	Whart. R.
Wright,	Ohio,	Wright R.
Wheaton,	U. S. Supreme Court,	Whea. R.
Wilcox,	Ohio,	Ohio R.
Woodbury & Minot,	U. S. 1st Circuit Court,	W. & M.
Wythe's Chancery,	Virginia,	Whythe C. R.
Yeates,	Pennsylvania,	Yea. R.
Yerger,	Tennessee,	Yerg. R.
Zabriskie,	New Jersey,	Zabr.

BRITISH REPORTS CITED.

REPORTERS.	ABBREVIATIONS.
Adolphus & Ellis, - - - - -	A. & E.
Ambler, - - - - -	Amb. R.
Barnewall & Cresswell, - - - - -	B. & C.
Barnewall & Adolphus, - - - - -	B. & Ad.
Bingham's Reports, - - - - -	Bing. R.
Bingham's New Cases, - - - - -	Bing. N. C.
Broderip & Bingham, - - - - -	B. & B.
Bulstrode, - - - - -	Bulst R.
Burrows, - - - - -	Burr. R.
Campbell's Nisi Prius Reports, - - - - -	Camp. N. P. R.
Clark & Finelly, - - - - -	Cl. & Fin.
Coke R., - - - - -	Co. or Rep.
Cowper, - - - - -	Cowp. R.
Croke's Charles, - - - - -	Cro. Car.
Croke's Elizabeth, - - - - -	Cro. Eliz.
Croke's James, - - - - -	Cro. Jac.
Douglass, - - - - -	Doug. R.
East, - - - - -	East R.
Dow, - - - - -	Dow R.
English Law and Equity Reports, - - - - -	E. L. & Eq. R.
English Common Law Reports, - - - - -	E. C. L. R.
Espannasse, - - - - -	Esp. R.
Hobart, - - - - -	Hob. R.
Howard's State Trials, - - - - -	How. St. Tr.
Levinz, - - - - -	Lev. R.
Lord Raymond, - - - - -	Ld. Raym.
Maule & Selwyn, - - - - -	M. & S.
Meeson & Welsby, - - - - -	M. & W.
Myline & Keen, - - - - -	Myl. & K.
Modern, - - - - -	Mod. R.
Plowden, - - - - -	Plow. Com.
Peere Williams, - - - - -	P. Wms.
Rolle, - - - - -	Rolle R.
Salkeld, - - - - -	Salk. R.
Saunders, - - - - -	Saund. R.
Scott's New Reports, - - - - -	Scott N. R.
Taunton, - - - - -	Taunt. R.
Term Reports, - - - - -	T. R.
William Blackstone, - - - - -	W. Bl.
Wilson, - - - - -	Wils. R.

MISCELLANEOUS WORKS CITED.

NAME OF WORK.	ABBREVIATION.
Adams on Ejectment, - - - - -	Ad. Eject.
American Leading Cases, - - - - -	Am. Lead. Ca.
Angell on Limitations, - - - - -	Ang. Lim.
Bacon's Works, - - - - -	Bac. Works.
Bacon's Abridgment, - - - - -	Bac. Abr.
Blackstone's Commentaries, - - - - -	Bl. Com.
Broom's Legal Maxims, - - - - -	Broom's Max.
Chitty's Pleadings, - - - - -	Chitty Pl.
Coke's Littleton, - - - - -	Co. Litt.
Comyn's Digest, - - - - -	Com. Dig.
Cruise's Digest, - - - - -	Cru. Dig.
Doctor and Student, - - - - -	Doct. & Stu.
Dwarris on Statutes, - - - - -	Dwarris.
East's Pleas of the Crown, - - - - -	East P. C.
Eden on Injunctions by Waterman, - - - - -	Eden Injunc.
Federalist, - - - - -	Fed.
Fonblanque's Equity, - - - - -	Fonb. E.
Foster's Pleas of the Crown, - - - - -	Fost. P. C.
Gale's Statutes of Illinois, - - - - -	Gale's Stat.
Greenleaf's Evidence, - - - - -	Greenl. Ev.
Institutes by Coke, - - - - -	Inst.
Kent's Commentaries, - - - - -	Kent Com.
Lieber's Legal and Political Hermeneutics, - - - - -	Lieber Herm.
Littell's Statutes of Kentucky, - - - - -	Litt. Stat.
Marshall's Decisions, - - - - -	Marsh. Dec.
Opinions of the Attorneys General of the United States, - - - - -	Op. Atty. Gen.
Paley's Works, - - - - -	Paley's Works.
Perkins' Treatise on Conveyances, - - - - -	Perk.
Revised Statutes of Illinois, 1845, - - - - -	R. S. Ill. 1845.
Revised Laws of Illinois, 1833, - - - - -	R. L. Ill. 1833.
Sergeant's Land Laws of Pennsylvania, - - - - -	Serg. Land Laws.
Shepherd's Touchstone, - - - - -	Touch.
Smith's Commentaries, - - - - -	Smith's Com.
Smith's Laws of Pennsylvania, - - - - -	Smith's Laws.
Starkie's Evidence, - - - - -	Stark. Ev.
Story on Constitution, - - - - -	Story Const.
Story's Equity Jurisprudence, - - - - -	Story Eq.
Sugden on Powers, - - - - -	Sug. Pow.
Sullivan's Lectures, - - - - -	Sul. Lec.
Sullivan's Land Titles, - - - - -	Sul. Ld. Titles.
Vattel's Law of Nations, - - - - -	Vattel.
Viner's Abridgment, - - - - -	Vin. Abr.
Webster's Works, - - - - -	Web. Works.
Western Legal Observer, - - - - -	Wes. Leg. Ob.

INTRODUCTION.

The subject of the following work is a matter of controlling importance to the landed interest of the United States, inasmuch as it relates to an extraordinary power, which is annually exercised over estates, and which, when well executed, works a complete divestiture of the title against the will of the owner, and oftentimes without his knowledge. This power has been exercised by all the States since their admission into the Union; and it has, on several occasions, been resorted to by the Federal Government. A very large number of cases involving the validity of titles, having their origin in this power, have been adjudicated by the Federal and State tribunals. The principles of law which relate to powers of this character, are calculated to enlist the attention of every lawyer; and in the new states especially, are of constant application in the regular course of his practice. Notwithstanding the importance of the law upon this subject, no separate treatise has been devoted to its investigation. Kent, in his Commentaries, has paid no attention to the subject, and Mr. Hilliard, in

his work on Real Property, dismisses it quite summarily; in fact, no general treatise upon American law, deigns to treat it upon principle. The annual digests of American decisions have not even assigned to it a separate title, and the reporters seem at a loss to know under what head they shall refer to it in their indices. The decisions of our courts upon the subject,—numbering upwards of one thousand—are scattered throughout the pages of seven or eight hundred volumes of the American reports, and are thus inaccessible to the mass of the profession. A work which shall present the principles relating to the execution of this class of powers, as illustrated by the numerous decisions of the Courts, is therefore much needed, and the importance of the subject justifies its publication. The attention of the author has been directed to this matter, by his employment in a number of tax title causes before the Supreme and Circuit Courts of Illinois, and the Circuit Court of the United States; and the difficulties under which he labored in the prosecution of his studies upon this branch of the law, and in the preparation of his briefs and arguments, suggested the idea that a separate treatise upon this subject would be well received by the profession at large. He accordingly named the matter to a friend,—an eminent lawyer of great experience, and perfectly familiar with the subject, even to its minutest details,—who not only cordially approved of the project, but promised to render every assistance in his power. The author

remembering the remark of Lord Coke, that some addition to the general stock of learning is "*a debt which every man owes to his profession*," cheerfully undertook the task, prosecuted it at such periods of leisure as occurred in the course of his engagements at the bar, and now submits it to public criticism. The author does not claim for himself originality in the execution of the work, either as to the ideas advanced, or even the language employed to express them. He has endeavored to present the principles which eminent judges and lawyers have laid down for the control of officers engaged in the execution of this class of powers, and when they themselves were clear in the mode of expression, he has not hesitated to adopt their language.

The plan of the work embraces the entire field of litigation upon the subject. The subject is arranged in the most natural manner which suggested itself to the mind of the author; the authorities upon which he has relied are invariably cited in the margin, and the author trusts that the subdivision of the work into chapters, appropriately headed, and the addition of a table of cases and contents, and a complete index, will render it easy of reference to every lawyer.

Reducing to a system, the rules which apply to tax sales, and the principles upon which they are founded, so as to render it perfect, is a task of much labor and difficulty. One of these difficulties grows out of the conflicting provisions of the revenue laws of the different States, and the peculiar *local policy* which

governs their construction. This is alluded to by Judge McLean, in delivering the opinion of the Supreme Court of the United States, in the case of *Games v. Stiles*, (14 Peters' R. 322,) which came up from the State of Ohio: "The laws of Ohio, imposing a tax on lands, and regulating its collection, like similar laws in, perhaps, almost all the other States, are *peculiar in their provisions, having been framed under the influence of a local policy. And this policy has, to some extent, influenced the construction of those laws.* There can be no class of laws more *strictly local in their character*, and which more *directly concern real property*, than these. They not only constitute a rule of property, but their construction by the courts of the States, should be followed by the courts of the United States with equal, if not greater strictness, than the construction of any other class of laws." Again, the sale of land for the non-payment of taxes, is a proceeding unknown to the common law of England. While the feudal tenure prevailed in that country, the enforcement of the collection of the *tallage, scutage* or *hidage* tax, by a sale of the land itself, would have been contrary to the policy of the feudal system. The vassal received the right of using and enjoying the land on condition of fealty and the performance of certain services, while the lord still retained the paramount right; and the fief was distinguished from allodial possessions, by the circumstance that it could not be aliened without the consent of the feudal lord. No tenant could be imposed upon him against his

will. For this reason, the fief could not be seized under execution, or sold for taxes which may have been levied upon it. Indeed, the only involuntary alienation of a feud, known to the common law, was its forfeiture for treason. The taxes were collected either by the imprisonment of the delinquent, the distress of his goods and chattels, or an execution against them out of the Exchequer. In modern times the land tax is farmed out, with a clause of entry and distress, and when these fail, resort is had to a suit in the Exchequer, by the farmer of the revenue, and sometimes a composition takes place between the land owner and the government, and the tax is redeemed by the payment of a gross sum. Thus the common law is a stranger to the power of sale exercised in this country over landed estates, for the non-payment of taxes assessed. Yet that law furnishes the principles by which this new power is to be governed. It is the chief excellence of the common law that it is flexible, and constantly expands with the exigencies of society; that it applies to new combinations of circumstances, those rules which are derived from its fundamental principles. In the language of Judge Story, "May it ever continue to flourish here, for it is the *law of liberty, and the watchful and inflexible guardian of private property and public rights.*"

CHICAGO, June, 1855.



POWER TO SELL LAND

FOR NON-PAYMENT OF TAXES.

CHAPTER I.

OF THE FUNDAMENTAL PRINCIPLES WHICH CONTROL THE TAXING POWER.

TAXES are defined to be burdens or charges imposed by the legislative power of a state, upon persons or property, to raise money for public purposes.¹

There is a manifest distinction between the taxing power and that of the eminent domain. Both, in effect, appropriate private property to public uses. They differ only in degree. But taxation exacts money from individuals, as their share of a public burden; and the tax payer, according to the theory of our system, receives a just compensation in the benefits conferred by the government, in the proper application of the tax. When, however, property is appropriated by virtue of the right of eminent domain, it is taken, not as the owner's share of a public burden, but as so much more than his share. *Special* compensation is, therefore, to be made.² The taxing power has no existence in a state of nature. It is the creature of civil society. Government begets its necessity. There must be interwoven in the frame

¹ 6 John R., 92; 11 John R., 77; *Bleeker v. Ballou*, 3 Wend. R., 263.

² *The People ex rel Griffin v. The Mayor of Brooklyn*, 4 Comstock's R. 419.

of every government a general power of taxation. Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must necessarily ensue; either the people must be subjected to continual plunder, or the government must perish for want of revenue to support it.¹ It may, therefore, be laid down as a principle of universal constitutional law, that the power to levy and collect taxes is an incident of sovereignty, without which no government could exercise the powers expressly delegated to it. In vain have the people, in their primary capacity, established government, and armed it with legislative, judicial and executive powers, unless the means of performing these functions have also been granted to the government, either expressly or by implication. In the Federal Constitution there is an express grant to Congress, of the power to "*levy and collect taxes.*" The State Constitutions do not confer this power upon the Legislature by any specific clause; it passes under the general designation of "*Legislative power.*" It is implied upon the principle, that a grant of legislative, judicial and executive powers, carries with it, by construction, all of the means necessary for their execution. It is also implied from the *limitations* to be found in the several State Constitutions, as to the manner of levying taxes. The power of taxation

¹ *Federalist*, No. 30.

operates upon all persons and property within the territorial jurisdiction of a State. There is no limitation upon the power of the Legislature, as to the *amount* or *objects* of taxation. The interest, wisdom and justice of the representative body, and its relation with its constituents, furnish the *only* security against unjust and excessive taxation. These principles are fully sustained by the authorities.¹ Such is the nature, necessity and extent of the taxing power. Let us now proceed to an examination of those *limitations* imposed upon the legislature, as to the *manner* of levying and collecting taxes. One of the reasons, assigned by a great lawyer and statesman, in justification of the grant of an adequate taxing power to every government, is the *protection* of the citizen from the "CONTINUAL PLUNDER" to which he would otherwise be subjected, by the *wants* of the government, and the *rapacity* of the public agents.² It is not to be presumed, therefore, that the people of this country, in framing their governments, designed, while conferring the taxing power for the express purpose of preventing the indiscriminate plunder of their property by public agents, to *legalize a system* by which the very evil they intended to guard against, might finally prevail. Besides, one of the great ends of government is the protection of private property, which, in a state of nature, was held by a precarious tenure, and liable to constant invasion by superior force. It would not, therefore, be reasonable to suppose that the citizen, in entering into a governmental compact for the purpose of appealing to the strong arm of constitutional law, when his rights of property

¹ *Providence Bank v. Billings*, 4 Peter's R. 514; *Brewster v. Hough*, 10 N. H. R. 138; *Mack v. Jones*, 1 Foster R. 393.

² Alexander Hamilton's *Federalist*, No. 30.

were invaded, intended to confer an *arbitrary* power of taxation upon the government, in the exercise of which his property would be rendered equally insecure as in the natural state. He would gain nothing by such a compact,—true, he would have a security against the force and fraud of his neighbors, but would thereby become a prey to the passions of the entire community, acting under color of a written constitution. Such a view of the constitution of a free people would render it a mere license to governmental plunder. Happily for the people, the power of taxation which they have delegated to their government, is not an *arbitrary* one, but *limited* by the words and spirit of the Constitution, and the principles of natural justice. Under the Federal Constitution, all revenue bills must originate in the popular branch of Congress; direct taxes must be apportioned among the States according to their respective numbers, to be determined by adding to the whole number of free persons, (including those bound to service for a term of years, and excluding Indians not taxed,) three-fifths of all other persons; taxes can only be laid for the purpose of paying the debts, and providing for the common defence and general welfare of the United States; no direct tax can be levied unless in proportion to the enumeration of persons as contained in the census, directed to be taken by the Constitution. In some of the States, all, and in others, many of the following limitations are imposed upon the taxing power. No tax can be levied, under any pretence whatever, without the consent of the people or their representatives. Revenue bills must originate in the lower branch of the legislature. Taxes can only be levied and collected for *public* purposes; this

is also implied from the very definition of a tax. The levy must be a reasonable one. The mode of levying the tax is directed to be by valuation, so that every person shall pay a tax in proportion to the value of his estate. In order to produce equality in the assessments, new valuations of property shall be taken at stated periods. No one species of property shall be taxed higher than another of equal value. In some of the States by constitution, in others by ordinance or compact, the lands of non-resident proprietors cannot be taxed higher than lands belonging to residents of the state; and it has been held by the Supreme Court of Alabama, that the clause in the Federal Constitution, which declares that "the citizens of each State shall be entitled to all of the privileges and immunities of citizens of the several States," forbade the legislature of that State from imposing a higher tax upon the property of non-residents than, by the general laws, were imposed upon residents.¹ To prevent the monies raised by taxation from being squandered, and thereby create the necessity for a new levy, it is declared that no money shall be drawn from the treasury but in consequence of appropriations made by law; and that the people may keep watch of their agents, it is further provided that accurate statements of the public receipts and expenditures shall be attached to and published with the laws, at the end of each session of the legislature. Such are the positive restrictions which the people, in the exercise of their inherent sovereignty, have seen proper to impose upon the taxing power of their representatives.

By compact made between the Federal Government

¹ *Wiley v. Parmer*, 14 Ala. R. 627.

and some of the new States, it is expressly stipulated that bounty lands, granted, or to be granted by the United States for military services, shall, while they continue the property of the soldier or his heirs, be exempt from taxation for the term of three years from the date of the patent; and that all lands sold by the United States, shall be exempt from taxation for the period of five years from and after the day of sale. Restrictions imposed by the Federal Constitution upon the taxing power of the States, may be noticed in this connection. The public domain of the United States cannot be taxed by the States in which they lie; nor can lands, purchased by the Government of the Union, with the assent of the State, for the erection of forts, magazines, arsenals, dock yards, mints, post offices, court and custom houses, and other needful buildings, which may be necessary in carrying into effect the powers entrusted to the Federal Government. This would be taxing the *means* employed by the General Government in the execution of its acknowledged powers. Besides, "exclusive legislation" is granted to Congress by the Constitution, over all such places as may be ceded by the States to the General Government, or may be purchased by the latter, with the consent of the States.¹ The last class of limitations upon the taxing power, as to the manner of levying the tax, are those which have their foundation in natural justice. That such exist is clearly established by the authorities.²

It is a fundamental principle in our government and laws, that individuals are protected in the enjoyment of their property, except so far as it may be

¹ 4 Whea. R. 316; 9 Whea. R. 738.

² 5 Dana R. 31; 9 Ibid. 516; 4 N. H. R. 556; 6 Har. & John. R. 382-3; 6 Barbour R. 209.

taken in one of two ways, viz: as a public tax, upon principles of just equality, or for public use, with a just compensation, ascertained according to the provisions of the Constitution. As money is property, the collection of every tax is taking property from the citizen, and to be legal, must be referable to one of the two modes above mentioned. The principle of just equality is, therefore, the governing one by which the validity of every tax levied by the legislature, is to be determined. This equality can only be secured by *uniformity* in levying the tax, and a *periodical* valuation of the estate of every citizen. If the tax is laid to raise a revenue for the expenses of the State, it should be laid equally upon all the property in the State. The legislature have not the power to exact from a single individual, or class of citizens, or a single county, city or town, the means of defraying the entire expenses of the State; for if this could be done, the constitutional prohibition could be evaded in all cases, and the legislature could take private property for public use, without compensation, under the vague and indefinite pretence of taxation. The distinction between constitutional taxation, and the taking of private property for public use, by legislative power, may not be definable with perfect precision. But it is clear, that whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated, without his consent, for the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be made by that public itself; or rather, shall be exacted by the same public will, from such constituent members of the same community generally, as own the same kind of property. This is in accordance with

the well known maxim, that a common burden shall be sustained by a common contribution. The ascertainment of the value of all the property in the state or district where the tax is to be levied, is essentially necessary, to enable the taxing power to make such an assessment as the wants of the state or district may require, to apportion it among all of the citizens of the state or district, and compel all to share equally in the common burden. Such are the principles by which the legislative power in this country is controlled in the levy of taxes, as laid down by all of the authorities. The difficulty seems to lie in their application to the facts of each particular case. We shall content ourselves with a reference to the adjudged cases, without attempting to reconcile them with each other.¹ Thus, in the language of Chancellor Kent: "It is not sufficient that no tax can be imposed on the citizens but by their representatives in the legislature. The citizens are entitled to require that the legislature itself shall cause all public taxation to be fair and equal in proportion to the value of property, so that no one class of individuals, and no one species of property, may be unequally or unduly assessed."²

Before treating of the rules which govern the courts in the construction of a class of statutes by which rights of property are affected, it may not be deemed inappropriate to consider the principles by which legislative power is controlled in this country. These principles are to be found in our written constitutions, and are deducible in a three-fold manner. 1. From the declared ends of government. 2. From

¹ 6 Barbour R. 209; 5 Dana R. 31; 9 Ibid. 516; 6 N. H. R. 556; 6 Har. & John. R. 382-3; 4 Comstock R. 419.

² 2 Kent's Com. 331.

the particular provisions of the Constitution. 3. From the structure of the government itself. In discussing this subject we shall refer to the Constitution of Illinois, because it is more familiar to us, while at the same time, it is substantially like that of every other State in the Union. The thirteenth article of that instrument, in order "that the general, great and essential principles of liberty and free government may be recognized and unalterably established," proceeds to declare: 1. "That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, and of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." 2. "That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness." It will be seen, on a critical examination of these provisions, that seven great and essential principles are declared: 1. That all men are created free and independent. 2. That they possess the rights of life, liberty, reputation and property, independent of human laws. 3. That these rights are indefeasible in their nature. 4. That *all* power is inherent in the people at large. 5. That human government is founded upon their authority. 6. That government is instituted for their security. 7. That the only end of government is the preservation and perpetuation of these inherent powers and rights.

They all affirm the great truth, that "*rights* are from nature, while *titles* and *remedies* are the *invention* of society."¹ The Hon. Edward Bates, now Judge of the

¹ Judge Pope, in *Arrowsmith v. Burlingame*, 4 M'Lean R. 497.

Land Court in St. Louis, in his argument in the case of *Hamilton v. The St. Louis County Court*,¹ thus enforces this position: "What is a Constitution, and what are its objects? It is easier to tell what it is not, than what it is. It is not the *beginning* of a community, nor the *origin of private rights*; it is not the fountain of law, nor the incipient state of government; it is not the cause, but consequence of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made; it is but the frame-work of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits and modes of thought. There is nothing primitive in it; it is all derived from a known source. It pre-supposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny. A written constitution is, in every instance, a *limitation* upon the powers of government, in the hands of agents, for there never was a written republican constitution which delegated to functionaries all the *latent powers* which lie *dormant* in every nation, and are boundless in extent, and incapable of definition. Our Constitution, in express terms, acknowledges and continues in force all former *rights*, laws, offices and functions of office." A similar recognition of existing rights is to be found in most of our constitutions. It is a simple affirmation of a principle of natural justice, that revolutionary and peaceable changes in

¹ 15 Mis. R. 13-14.

the form of a government do not overturn the established rights, duties and obligations which may have been acquired or created prior to the change.¹ Nor has a conquest any such effect.² Rights and obligations depend upon the natural law for their existence and mode of enforcement. Force was the vital principle of society in a state of nature. This led to violence and bloodshed. Peace and civilization demanded a substitute. This superinduced government, the theory of which, is the surrender of remedies into the hands of the chosen agents of the people at large. It thereupon became the duty of the society to provide remedies for the enforcement of every right, and the redress of every wrong. This was done by the organization of a government, divided into three great departments, in each of which such portions of the sovereign power was lodged as was deemed necessary to effect this object. The legislature have power to prescribe general rules for the government of society; the courts are empowered to expound and apply these rules to the facts of each individual case; and the executive power enforces the sentence of the law. It would seem, therefore, to be the simple duty of government, to regulate the mode of acquisition and transfer of property, to declare what should be evidence of the owner's right, and to furnish him with a remedy to enforce it. It follows of necessity, that neither the whole government, nor any department thereof, has any *inherent* power; that it can rightfully exercise such powers only as have been delegated to it by the people, in their written constitution; and that these powers are to be exercised, *in*

¹ 9 Cra. R. 43; 4 Whea. R. 518; 8 Whea. R. 464.

² 8 Whea. R. 588; 1 Pet. R. 542; 7 Pet. R. 51; 12 Pet. R. 410.

subservience to, and not in subversion of, the declared ends of government. We must, therefore, look to the constitution itself to ascertain what power is delegated to the government, and each of its departments. That constitution declares, that "the legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both to be elected by the people;" that "the executive power of the State shall be vested in a governor;" and that "the *judicial* power of this State shall be, and is hereby, vested in one supreme court, in circuit courts, in county courts, and in justices of the peace." These are all of the powers which the people have delegated to the government. They constitute together, the power to make, apply and execute laws. But they are held by the government in trust, to be exercised for the protection, and not destruction, of the rights of life, liberty, reputation and property. This simple limitation, resulting from the declared ends of the government, if faithfully observed, would be a sufficient guarantee against governmental wrong. But the people, in the abundance of their caution, have thought proper to impose many specific limitations on these general powers of the government, for the purpose of more effectually protecting the life, liberty, reputation and property of the citizen. Those relating to the security of life, liberty and reputation, may be thus enumerated. No *ex post facto* law shall ever be passed. No person shall, for the same offence, be twice put in jeopardy. No person shall be held to answer for any criminal offence, unless on the indictment, or presentment, of a grand jury. No person shall be compelled to give evidence against himself. General warrants to search or seize

a citizen, are prohibited. In all criminal prosecutions the accused hath a right to be heard, by himself and counsel; to demand the nature and cause of the accusation against him; to confront the witnesses against him; to have compulsory process to compel the attendance of witnesses in his favor; and to a speedy public trial, by an impartial jury of the vicinage. All persons shall be bailable by sufficient sureties. Excessive bail shall not be demanded. All penalties shall be proportioned to the nature of the offence. No person shall be transported out of the State. No person shall be imprisoned for debt. There shall be neither slavery nor involuntary servitude in this State. Every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. The pardoning power is vested in the executive; and the privilege of the writ of *habeas corpus* is secured.

The specific limitations in favor of property are as follows: Private property shall not be taken for public use without just compensation. All taxes shall be levied by valuation of estates. The obligation of contracts shall remain inviolate. No conviction for crime shall work a forfeiture of estate, or corruption of blood. No soldier shall be quartered upon the citizen. The people shall be secure in their houses, papers and possessions from unreasonable searches. Besides the foregoing, there are three additional guarantees in favor of the rights of the citizen: 1. "No freeman shall be imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in *any manner* deprived of his life, liberty or property, but by the JUDGMENT OF HIS PEERS, OR THE LAW OF THE LAND." 2. "Every person in this State ought to find

a certain remedy *in the laws*, for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws;" and 3. "The right of trial by jury shall remain inviolate."

Such are the specific limitations and guarantees of the Constitution in favor of life, liberty, reputation and property; and for the purpose of keeping them in the constant view of the people, and every branch of the government they have instituted, it is emphatically declared "That a *frequent recurrence* to the fundamental principles of civil government, is absolutely necessary to preserve the blessings of liberty." These provisions, and the declared ends of government, would seem to afford ample security to the rights of individuals, at least so far as they can be secured by mere paper declarations. But experience has abundantly proven, that mere declarations of rights and restrictions of power, afford, of themselves, but feeble security against the abuse of governmental authority. Sir William Blackstone, after treating of the absolute rights of individuals, as defined and protected by the laws of England, says: "In vain would these rights be declared, ascertained and protected by the *dead letter of the laws*, if the Constitution had provided *no other* method to secure their *actual* enjoyment. It has, therefore, established certain other auxiliary *subordinate* rights of the subject, which serve principally as *outworks* or *barriers*, to protect and maintain inviolate, the three great and primary rights of personal security, personal liberty and private property."¹ The people of the United

¹ 1 Blackstone's Com. 140.

States have, in their Constitutions, done the same thing, with this essential difference, that the out-works and barriers erected for the protection of these primary rights, are much more complete and perfect than those of the British Constitution. These rights are defined and declared in our Constitutions, substantially as they are by the Common Law, but with us the declaration of rights is absolutely binding upon the government, and every department thereof, while in England they do not bind the government. There the practical maxim is, that Parliament is omnipotent, and the only guarantee the subject has against legislative aggression, is in the organization of Parliament, and in the individual responsibility of the members of the popular branch, to their constituents. In this country, we have an appeal to an independent and impartial judiciary, who will bring legislative acts to the test of the Constitution, and if found to be in violation of that instrument, will arrest their progress, by declaring them unconstitutional and void, before they reach their intended victims. This doctrine, though seriously resisted at first, is now the settled law of the land, and familiar to all. The reasoning in support of it is unanswerable. All power is inherent in the people. The Constitution is the form of government instituted by them in their sovereign capacity, in which, first principles are laid down, and fundamental laws established. It is the supreme, permanent and fixed will of the people, in their original, unlimited and sovereign capacity. In it the inherent rights of the citizen are recognized, and the obligation and duty of the entire community to protect and preserve them inviolate, are specifically provided for. It is

the power of attorney of the people to their servants and agents—the government of the State. From the decrees of the Constitution there can be no appeal, for it emanates from the highest source of human power. An act of the legislature is the will of the people, in a derivative and subordinate capacity. The Constitution is the commission of the legislative body, and that body must act within the pale of its authority, and all of its acts contrary to, or in violation of the constitutional charter, are absolutely void. The supremacy of the Constitution over ordinary laws, is the great reason why the latter should give way when inconsistent with the former. The oath of fealty taken by every officer of the government, demands, at the hands of the judges, an adherence to the fundamental law. Besides, the Constitution is a law to which every citizen is a party, but acts of the legislature are but the will of a majority of the community. To make them binding upon the minority, they must be in conformity with the principles of the Constitution; to the adoption and continuance of which, every one is presumed to have assented. If the legislature, in the exercise of an unlimited discretionary power, can overleap the barriers of the Constitution, and put at defiance the fundamental principles of the government, then our boasted freedom and independence is all a mere delusion,—and instead of looking up to the fabric of our political institutions with reverence, as the means of establishing an immense empire, in which freedom and the rights of man shall be understood and maintained, the government of the law only acknowledged, and the eternal principles of justice secured to all, we shall, in the language of a distin-

guished statesman, "be called upon to curse our revolution as a great fountain of discord, violence and injustice."¹ In the language of Chief Justice Gibson: "It is idle to say that the authority of each branch of the government is defined and limited in the Constitution, if there be not an *independent power* able and willing to enforce the limitations. Experience proves that the Constitution is thoughtlessly, but habitually, violated; and the sacrifice of individual rights is too remotely connected with the objects and contests of the masses, to attract their attention. From its every position, it is apparent that the conservative power is lodged in the judiciary, which in the exercise of its undoubted rights, is bound to meet every emergency; else causes would be decided not only by the legislature, but sometimes without hearing or evidence."²

In the election, qualification and organization of the various officers which constitute the several departments of the government, our constitutions are also more complete than in the English system. Here the people elect all of their officers. In England most of the important offices are held independently of the people. But the great advantage of ours over the British Constitution, consists in the division of the government into separate, independent and co-ordinate departments, and the consequent limitation of legislative power. As a practical idea, this is purely American. It is the great feature which distinguishes ours from every other government. In all others the theory is, that the legislative authority is supreme and despotic, absolutely incapable of lim-

¹ *Runnels v. State*, Walker R. 147; *Phebe v. Jay*, Bre. R. 209, *Marbury v. Madison*, 1 Cranch R. 137.

² *De Chastelleux v. Fairchild*, 15 Pa. State R. 18.

itation; consequently that an act passed with the usual solemnities, however oppressive and unjust it may be, is absolutely obligatory, and must be obeyed. This distributive feature of our government, as it is deemed the most important of any, is the only outwork or barrier established by the Constitution against governmental abuse of power, which we propose to consider minutely.

The Constitution of Illinois sets out with this declaration: "The powers of the government *shall be* divided into three distinct departments, and each of them be confided to a separate body of magistracy; those which are legislative to one, those which are executive to another, and those which are judicial to the third." The principle thus established is carried out in detail by the organization of a general assembly, consisting of a senate and house of representatives, and investing it with the legislative power of the State; by the organization of an executive department, called the governor, in which the executive power of the State is lodged; and by the organization of supreme and inferior courts, to whom the judicial power of the State is delegated. The Constitution then limits the power of each of these great departments as heretofore shown, and declares in the most explicit language, "that no person, or collection of persons, being one of these departments, shall exercise *any power* properly belonging to either of the others, *except as hereinafter expressly* directed or permitted, *and all acts in contravention of this section, shall be void.*" It will be perceived, by a careful analysis of the whole instrument, and the above sections, that *all* legislative power is vested in the general assembly; that the *whole* judicial power which the people

intended to grant, is vested in the courts, and that every executive function of the government is vested in the governor. This is to be understood subject to the *exceptions* expressly enumerated in the Constitution, which serve as an additional proof of the truth of the general rule. One of these exceptions is the impeachment of public officers. The House of Representatives may impeach, and the Senate try the offender. Thus the whole judicial power of the State is vested in the courts, with the exception of the trial of impeachments. It will be further perceived, that the general assembly and governor, or either of them, cannot exercise any judicial functions; that neither the general assembly or the courts can exercise any executive power; and that neither the governor or courts can properly exercise any legislative power. And if, in any case, they transgress the principle thus laid down, their act is a nullity. It will also be seen that the disqualification extends to the *person and the department*. The great principle thus established is, that no person or department shall act as legislator, judge and executioner at the same time. He shall not be permitted to enact, apply and execute a law, by which the life, liberty, property or reputation of the citizen may, in any manner, be affected. While these propositions are universally admitted, the difficulty in carrying them into practical operation, seems to be in defining with precision the exact limits of legislative, executive and judicial power. With due deference to timid judges, who seem unable to surmount this difficulty, and therefore give loose rein to legislative power, it may be laid down as a self-evident proposition, that the power of the legislative department is

limited to the *making of laws*, and not to the *exposition or execution of them*. Again, it is the province of the legislature to declare what the law *shall be*, and not what it is, or was. The exercise of their power, precedes the conduct intended to be affected by it. It would be contrary to the first principles of justice, to deprive a citizen of his life, liberty or property by an *ex post facto* or retrospective law. Under such a system of legislation, no person could be secure in his rights; no one could ever know what his rights were, nor for what act of omission or commission on his part, they might be forfeited to the State. Such an administration of the government would be intolerable—as unjust as the enactment of general laws, and at the same time, Caligula-like, withholding a knowledge of their provisions from the people, upon whom they were designed to operate. To use the expressive language of Judge Coulter: “That *is not legislation* which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government.”¹ On the other hand, the judicial power of the State acts upon past conduct, and declares what the law *was* at the time of the happening of the act complained of. It will thus be seen that the true distinction between judicial and legislative power is, that the former acts upon *past* conduct, while the latter prescribes the rule by which human action shall be governed in the *future*. If this plain line of demarcation between these two classes of governmental power, is strictly observed and rigidly enforced, the difficulty attending this

¹ 16 Pa. State R. 266.

controversy will be surmounted, and the rights of the citizen more fully secured.

Our Constitutions all declare "That no freeman shall be imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty or property, but by the JUDGMENT OF HIS PEERS, OR THE LAW OF THE LAND." This clause, on account of its bearing on the subject under consideration, as well as its great importance when properly understood, as a protection against legislative spoliation, also deserves a critical examination. It will be observed that the clause does not absolutely prohibit the legislature from depriving a freeman of his life, liberty or property, but declares that it shall only be done in one of two ways: 1. "By the judgment of his peers;" which is universally admitted to mean a judgment rendered upon the verdict of a jury; or, 2. "By the law of the land,"—this, in England, where the same language was used in *Magna Charta*, was well understood to require a judgment; and embraced judgments, by confession in criminal and civil causes, upon demurrer, by default, and all other judgments which, by the general laws of the realm, it was legal to render without a regular trial by jury: such as judgments for contempt, convictions under the military and naval laws of the kingdom, judgments in the ecclesiastical and other courts, proceeding according to the course of the civil law. Lord Coke said, that "to judge a man in a civil or criminal case, without affording him an opportunity to be heard in his own defense, would be against this provision."¹

That this was the meaning of the expression, "LAW

¹ Sullivan's Lec., C. 39 and 40.

OF THE LAND," as used in the great charter of English rights, seems to have been the opinion of all the common law jurists in that country; but that it means the same thing in our own Constitution, has not been so universally agreed. Some judges have been greatly perplexed in attempting to ascertain its true meaning, and have given judgment in entire disregard of it. One judge, at least, admitting that it did mean and require a "*judgment*," obviated its force by saying it applied only to criminal cases, and that, unless the clause was so restricted, it would be in opposition to legislative usage.¹ The Supreme Court of New Hampshire, in the Dartmouth College case, decided "That all statutes, not repugnant to *any other* clauses of the Constitution, seem always to have been considered as 'the law of the land,' within the meaning of *this* clause."² But their judgment was reversed by the Supreme Court of the United States.³ In another case, where the validity of a statute authorizing an arrest in a criminal case, without oath or warrant, came in question, the same court held the following language: "No subject shall be arrested but by the '*law of the land*,'—that is, by due process of law warranted by the Constitution, by the common law adopted by the Constitution, or by statutes passed in pursuance of the Constitution."⁴ On the other hand, Judge Bronson says that these words "Do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction nugatory, and turn this part of the Constitution into mere nonsense. The people would

¹ *Rhinehart v. Schuyler*, 2 Gilm. R. 520.

² 1 N. H. R. 130.

³ 4 Whea. R. 518.

⁴ *Mayo v. Wilson*, 1 N. H. R. 53.

be made to say to the two houses, 'You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose.' In other words, 'You shall not do the wrong unless you choose to do it.'"¹

C. J. Hemphill says: "The terms, 'law of the land,' have often been construed, and somewhat variously defined. When first used in the Magna Charta of the kings of England, they probably meant the established law of the kingdom, in opposition to the civil or Roman law, which was about being introduced into the land, to the exclusion of the former laws of the country. They are now, in their most usual acceptance, regarded as *general public laws*, binding upon all the members of the community, under all circumstances, and not *partial* or *private* laws, affecting the rights of private individuals, or classes of individuals."² The conjecture of Judge Hemphill, that it was the *common* as contradistinguished from the *civil* law, intended by this clause, is not a very reasonable one, when it is remembered that Sullivan, in his lectures, and all of the English jurists, agree that judgments in the *ecclesiastical* and *maritime* courts, which proceed upon the principles, and in conformity to, the practice of the civil law, are regarded as valid under this clause; and when it is further remembered that such a construction of the term law, would confine the people of England to the old black letter law, without the legislative power of modifying and improving it, to meet the progressive demands of modern civilization.

¹ *Taylor v. Porter*, 4 Hill R. 146.

² *James v. Reynolds*, 2 Texas R. 251-2.

Judge Catron remarks, that "the clause, '*law of the land*,' means a *general* and *public* law, *equally* binding upon every member of the community. The right to life, liberty and property, of every individual, must stand or fall by the *same rule* or law that governs *every other* member of the body politic, or '*land*,' under similar circumstances; and every *partial* or *private* law, which *directly* proposes to destroy or affect individual rights, or does the same thing by *affording remedies* leading to similar consequences, is unconstitutional and void." Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another. The idea of the people, through their representatives, making laws whereby are swept away the life, liberty and property of one, or of a few citizens, by which neither the representative nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name."¹ This doctrine is advanced by Judge Peck, in the same case, in these words: "A law which is *partial* in its operation, intended to affect particular individuals alone, or to deprive them of the benefit of the *general* law, is unwarranted by the Constitution, and void."² The principle was again affirmed in *Jones v. Perry*.³ In this case the court held that the sale of the estate of a ward, by his guardian, under a *special* act of the legislature, no judicial proceedings intervening, was not a sale according to the "law of the land." The same principle was applied by the Supreme Court of Illinois, upon

¹ *Vanzant v. Waddell*, 2 Yerger R. 270.

² 2 Yerger R. 269.

³ 10 Yerger R. 59.

this state of facts: The legislature passed a *special* act authorizing A. to sell and convey the lands of an intestate, or a sufficiency thereof, to raise the sum of \$1,008 87, together with interest and costs; and directed that the proceeds should be applied to the extinguishment of the claims of A. and B. against the estate of the decedent, for moneys advanced, and liabilities incurred by them on account of the estate. The court held the law unconstitutional because it was an exercise of judicial power by the legislature, and also, to use the language of the court, it "disseizes the freehold of the heirs of the ancestor, without a hearing, upon an *ex parte* application and *ex parte* evidence. It will not, we suppose, be *seriously* contended that such an act, thus passed, under such a state of facts, is the *lex terræ* meant, or the judgment of one's peers, intended by the Constitution."¹ The same construction is given to this clause by the Supreme Court of Tennessee, in two other cases.² In the latter case it was held, that an act of the legislature, declaring it a *felony* for a servant to embezzle the funds of a *particular* bank, while the same crime, under the general law, was a simple *misdemeanor*, was contrary to this clause, and void. The same principle was applied by the Supreme Court of Massachusetts, to a special act of the legislature, suspending the operation of a *general* limitation law, in favor of a particular class of creditors.³ In South Carolina they hold that the Constitution guarantees to the citizen "*a trial according to the course of the common law, which,*" says Judge O'Neill, "*I understand to be the meaning of the words 'the law of the land.'*"⁴ Again, in *Byrne*

¹ *Lane v. Dorman*, 3 Scam. R. 238.

² *State Bank v. Cooper*, 2 Yerger R. 605-6; *Budd v. State*, 3 Humphrey R. 483.

³ *Holden v. James*, 11 Mass. R. 396.

⁴ *Burger v. Carter*, 1 McMullen R. 413; *State v. Simons*, 2 Speer R. 767;

v. *Stewart*, Chancellor Watties remarks: "It has been determined by the Constitutional Court, in several cases, that the *lex terræ* contemplated by our Constitution, not only means the *common law*, which is unquestionably the sense in which it is understood in *Magna Charta*, but also comprehends all acts in force at the time of making the Constitution."¹ Such a construction of the clause is evidently too narrow and confined, as it would tie up the hands of the legislature, and prevent them from enacting laws which the imperative necessities of society may from time to time require. The masterly and comprehensive definition of this clause by Daniel Webster, is, perhaps, the true one, and sustained with more unanimity by the authorities than any other: "By the *law of the land*, is most clearly intended the *general law*—a law which hears before it condemns—which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of *general rules* which govern society. Everything which may pass under the *form of an enactment* is not, therefore, to be considered as the law of the land. If this were the case, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance, completely inoperative and void. The administration of justice would be an empty form

Zylstra's Case, 1 Bay R. 384; *White v. Kendrick*, 1 Brevard R. 471; *State v. Coleman*, 1 McMullen R. 502.

¹ 3 Dessausurre R. 478.

and idle ceremony, and judges would sit to execute legislative judgments and decrees, not to declare the law and administer the justice of the country.”¹ In *Taylor v. Porter*,² Judge Bronson says of this provision: “The meaning of this section, then, seems to be, that no member of the State shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial, had according to the course of the common law. It must be ascertained judicially, that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either can be taken from him. *It cannot be done by mere legislation.*” Again he remarks: “It will be seen that the same measure of protection against legislative encroachment, is extended to life, liberty and *property*; and if the latter can be taken without a *forensic* trial and judgment, *there is no security for the others.*” He concludes that “the law of the land” and “due process of law,” are synonymous terms. A similar decision was made in *White v. White*.³ The doctrine of Webster and Bronson is adopted, in its fullest extent, by the Supreme Court of Iowa.⁴

Judge Story says that “this clause, in effect, affirms the right of trial according to the process and proceedings of the common law.”⁵ Chancellor Kent says: “The words, ‘by the law of the land,’ as used in Magna Charta, &c., are understood to mean *due process of law.*”⁶ Justice Johnson, in delivering the opinion of the court in the *Bank of Columbia v.*

¹ Argument in the Dartmouth College Case, 5 Webster’s Works, 487-8.

² 4 Hill, 146.

³ 5 Barber S. C. R. 481-3.

⁴ *Reed v. Wright*, 2 Greene Iowa R. 22-4.

⁵ Story on the Constitution, Sec. 1783.

⁶ 2 Kent’s Commentaries, 13.

Oakey,¹ and speaking of these words, says, that "after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the *arbitrary exercise* of the powers of government, *unrestrained* by the established principles of private right and *distributive* justice." The clause in question accomplishes this intention completely, if it requires judicial as well as legislative action; but if it means that a man may be deprived of his rights, simply by an act of the legislature, without judgment, it is difficult to perceive, in such a case, how the citizen can be said to be secured against the arbitrary exercise of legislative power, or how the legislature is restrained by the established principles of private right and distributive justice. Judge Woodworth, in *Woodcock v. Bennett*,² remarks that "it is one of the great principles upon which our security depends, under a government of laws, that no person shall be put out of his freehold, or lose his goods and chattels, unless he be duly brought to answer, or be forejudged of the same *by due course of law*." Judge Tucker says of these words, "the meaning and intention of which, certainly is, that no man shall be deprived of his property, *without being first heard in his own defence*."³ Chief Justice Ruffin says: "This clause does not mean an act of the legislature, for that construction would abrogate all restriction on legislative authority. The clause means that statutes which would deprive a citizen of the rights of person or property, without a regular trial according to the course and usage of the common law, would

¹ 4 Pet. Cond. R. 443.

² 1 Cowen R. 740.

³ *Kenny v. Beverly*, 3 Hen. & Munf. R. 336.

not be the law of the land in the sense of the Constitution.”¹ In *Brown v. Hummel*,² it is said by the judge delivering the opinion of the court, that, “By the law of the land is meant, the law of an individual case, as established in a fair open trial, or an opportunity given for such trial, in open court, and by due course and process of law; not a bill of attainder, in the shape of an act of assembly, whereby a man’s property is swept away from him without a hearing, trial or judgment, or the opportunity of making known his rights, or producing his evidence.” Again, the same court, in *Ervine’s Appeal*,³ state that this clause “Is an affirmation of a great doctrine contained in Magna Charta: ‘Neither will we pass upon any one, but by the lawful judgment of his peers, or by the law of the land;’ and Lord Coke says that the words *per legem terræ*, mean by due process of law, and being brought into court to answer according to law. If government is interdicted from taking private property, even for public use, without just compensation, how can the legislature take it from one man, and dispose of it as they think fit? The great principle is, that a man’s property is his own, and that he shall enjoy it according to his pleasure—injuring no other man,—until it is proved, in due process of law, that it is not his, but belongs to another.” Judge Pope affirms the same general principle in *Arrowsmith v. Burlingame*.⁴

Upon a careful review of all the authorities, it may be safely affirmed as a principle of constitutional law, that the clause in question requires

¹ *Hoke v. Henderson*, 4 Dev. R. 15.

² 6 Barr. R. 87.

³ 16 Pa. State R. 256.

⁴ 4 McLean R. 498.

judicial as well as legislative action, before any person can be deprived of his life, liberty or property. Even those who have questioned the correctness of this construction, admit that it was so construed in England, and the only reason assigned for not adhering to the same construction in this country, is, that many acts of the legislature would be inconsistent with it, and, therefore, this cannot be its true meaning; thus bringing the Constitution to the test of legislation, instead of legislation to the test of the Constitution. Such a position amounts to a virtual abrogation of all constitutional restraints upon the power of the legislature, and makes that body as omnipotent as Parliament itself. On the other hand, the power of the legislature, as limited by the weight of authorities, consists in the power to pass *general* laws for the peace, safety and happiness of the people, directing what they may do or omit, and declaring the consequences of a violation of such laws. Here their power ceases. The application of those laws to the cases of individuals, is assigned to other agents; consequently the legislature has no power, by its own mere action, to deprive any citizen of his property.

Such are the securities which the people, in the exercise of their inherent powers, have provided against legislative spoliation. It will be seen that every individual has, in the Constitution, an absolute, complete and perfect protection in the quiet use and enjoyment of his property, until it shall be judicially ascertained that he has violated some general law of the land, which authorizes a seizure and divestiture of his right thereto, for such violation. This is most clearly the true reading and exposition of the text

of the Constitution. If, however, the requirements of the Constitution must yield to legislative usage, in direct violation thereof, then, of *necessity*, all legislative acts which conflict with these great fundamental principles, should be held, in their construction and application, to the most rigid scrutiny.

In concluding this branch of the subject, it may not be considered improper to make a few suggestions in relation to the constitutional mode of enforcing the collection of taxes.

The power to levy a tax properly belongs to the legislative power. The collection of it involves the exercise of judicial and executive functions. The legislature levy the tax—direct that a demand shall be made upon the owner of the land for the tax charged against it, and if payment is refused, authorizes the collector to seize the body or goods of the delinquent, and in case satisfaction is not had in one or the other of these modes, power is conferred upon the collector to sell and convey the land itself. Now before the power to sell the land can exist under the law, the fact of the levy and non-payment of the tax, the demand, and return of no goods, or that the body cannot be found, must exist. These facts must be ascertained to exist before the power of sale attaches. Whether the power to decide the question of delinquency is vested by law in the regularly constituted judicial tribunals, or in those specially instituted for that purpose, or in the collector himself, can make no kind of difference; it is the exercise of judicial power, and the officer who sells performs an executive function; so that, in point of fact, the legislative, judicial and executive departments of the government, all aid in the execution of the taxing

power. The legislature declare what facts shall constitute a cause of forfeiture; the judiciary ascertain the facts, apply the rule of law prescribed, and pronounce a judgment of condemnation. For these reasons it has been suggested by an eminent lawyer of Illinois, who has great experience in questions of this character, that "No valid sale of land, for the non-payment of a tax, having the effect of divesting the owner of his estate, can legally take place, unless each of the three great departments of the government concur in the condemnation." It was in accordance with this suggestion that the Legislature of Illinois, in 1839, passed a new revenue law, levying an uniform tax, requiring a personal demand of the owner, and directing, that in case payment of the tax was neglected or refused, the goods and chattels of the delinquent should be seized and sold in satisfaction. The collector was required to report a list of the delinquents who had no goods and chattels in the county, out of which the tax could be levied, to the Circuit Court of the county, and apply for judgments against their lands, first giving notice in a newspaper, of his intention to make the application. Upon filing his report, and a copy of the advertisement, certified by the printer, if no objection was taken to the regularity or legality of the proceedings, the court was authorized to render a judgment for the taxes, and order a sale of the land. After judgment the clerk was required to make out, under the seal of the court, and deliver to the collector, a precept containing a copy of the report and the order of the court thereon, which constituted the authority of the officer to sell. This continues substantially the law of Illinois to this day. Similar statutes were

in force in Tennessee, Ohio and Indiana. No such power as that of selling land for the non-payment of taxes, is to be found in the revealed, natural, civil or common law. But there are analogous powers to be found in the common law code, and in the statute law of every civilized nation; for example, the power to condemn land for public uses, and in other cases where power is exercised over the estates of the citizen, such as the sale of land for the payment of the debts of the owner. In all of these cases judicial proceedings intervene. The Constitution declares that private property may be taken for public use, upon making just compensation. The legislature direct the laying out of a public highway. Before the title of the owner is divested, a regular judicial inquiry takes place. The questions, whether the use is a *public* one, or whether it is a mere legislative pretence to divest the title of the owner, and confer it upon a favorite, and what compensation shall be made to the owner, as an equivalent for the loss of his estate, are all inquired into and judicially decided, after due notice and a hearing. So in every case where the title to real or personal property is sought to be divested under the general laws of the land, judicial proceedings always intervene. There is no difference in principle, between the power of taking land for public use, and the power to tax, and enforce its collection by a sale of the land. In both cases the land is taken for the use of the public; they differ only in degree. Why, then, should not the same solemn forms be pursued in the one case as the other? The only answer is, *state necessity* and *immemorial usage*. The former demands, and the latter sanctions, this departure from the letter and spirit of

the Constitution. It is said in *Parham v. Decatur County*,¹ that "the sovereign right to lay and collect taxes grows out of the *necessities* of the government—an *urgent necessity*—*which admits no property in the citizen while it remains unsatisfied*. The right to tax is coeval with all governments. It springs out of the organization of the government. *All property is a pledge to pay the necessary debts and expenses of the government.*" The Supreme Court of Tennessee decided that their *summary* tax laws were constitutional, holding this language: "It is certainly true that they have the character of *summary* proceedings, and it is equally true, that they must, of necessity, be so; for if the government were necessitated to take the cautious and tedious steps of the common law, in giving personal notice, making up regular pleadings, and having a trial by jury, judgment and execution, it would cease to exist, for want of money to carry on its necessary operations; loss of credit, and a total extinction of the national faith, the basis of all regular governments, must be the inevitable consequence."² In the case of *The State v. Allen*,³ the court, in commenting upon the *lex terræ* of the Constitution, as applied to these summary tax laws, say: "We think that any legal process, which *was originally* founded in *necessity*, *has been consecrated* by time, and approved and acquiesced in by universal consent, must be an *exception* to the right of trial by jury, and is embraced in the alternative, '*law of the land*.'" And in *Harris v. Wood*,⁴ the Court of Appeals of Kentucky remark, that "Taxes were always recoverable (before

¹ 9 Geo. R. 352.

² *McCarroll v. Weeks*, 2 Tenn. R. 215.

³ 2 McCord's R. 56.

⁴ 6 Munroe R. 643.

the adoption of the Constitution,) not only without a jury, but even without a judge, and the assessment of ministerial officers has been made to operate as an execution on the citizen, and the collector could distrain, &c." The same general doctrine has been asserted in other cases.¹ It is undoubtedly a principle of natural justice, that every person shall have an opportunity of being heard before he is condemned; and to a hearing every tax payer is entitled—but not before the ministerial officers of the law. They act at their peril in selling the land of the person assessed, where the taxes have been paid, or where they have not strictly complied with the law of the land; and he acts at his peril in determining the question whether he will redeem or contest the validity of the sale. If he adopts the latter course, then, and not till then, is he entitled to be fully heard in his defense, in the judicial tribunals of the country.²

Thus it will be seen that all of the cases concede that the summary exercise of this power is against the spirit of the Constitution, but defend it upon the ground of immemorial usage and state necessity. But to use the emphatic language of the Supreme Court of Missouri, in the case above cited: "*This very necessity begets another necessity, that in the execution of such a power the law shall be strictly and punctiliously complied with in all of its requirements.*" Besides, so cautious are the courts in confining the taxing power within the bounds of "state necessity," that they will never permit the enforcement of a penalty, or double tax, in a *summary* manner, under

¹ *Doe v. Devours*, 11 Geo. R. 79; 6 Missouri R. 64; *Bergen v. Clarkson*, 1 Halstead R. 352; *Livingston v. Moore*, 7 Pet. R. 669, Appendix.

² *Willard v. Wetherbee*, 4 N. H. R. 118.

the "vague and indefinite pretense of taxation." Taxation includes the power to collect, in a summary mode, the amount levied, from the necessity of the case. This arbitrary, but indispensable power must be used only to the extent absolutely demanded by the public necessities, and never abused by applying it to the purposes of penal enactments, and under the guise of taxation, to impose penalties which are to be enforced without recourse to the ordinary tribunals. The Constitution protects the citizen from all judgments against his person or property, otherwise than by a regular jury trial, as heretofore accustomed. Now the only difficulty in enforcing this guarantee, is to distinguish between a tax and a penalty. That is a tax, which bears equally upon the whole community, but that which is added to the burden of one citizen, because of his failure to list his land for taxation, called "*dooming*," and the double and triple tax levied upon him, by reason of his neglect to pay his tax when due, can in no proper sense be termed taxes; they are, in fact, penalties. Judge Richardson, in *Burger v. Carter*,¹ says: "It is admitted that under this wise, protective provision, 'law of the land,' if the alleged tax *shall amount to a penalty*, for some infraction of the law, the tax collector cannot, by his authority, assess the penalty *under the name of a tax*, for if it is a penalty, a jury must decide upon the supposed infraction before the penalty can be inflicted."

¹ 1 McMullen Law R. 420.

CHAPTER II.

OF THE NATURE OF THE POWER TO SELL LAND FOR THE
NON-PAYMENT OF TAXES, AND OF THE STRICTNESS RE-
QUIRED IN SUCH SALES.

ACCORDING to the strict rules of the common law, the *only* authority which a stranger could exercise over an estate in land, was a power of selling, leasing or incumbering it. The power was voluntarily created by the owner. It was always a naked power, and general or special according to the will of the donor. Involuntary alienations were contrary to the policy of the feudal system, and consequently no estate could be divested by mere operation of law, and against the will of the owner, except in the single instance of its forfeiture for high treason; and then the power was exercised through the intervention of the judicial tribunals. From the nature of voluntary alienations, and the mode of effecting them—by feoffment and livery of seizin—it is very certain that they did not admit of the annexation to them, of powers of appointment and revocation. The strictness of those times would not countenance the apparent repugnancy of giving or selling an estate absolutely to another, and yet reserving to the feoffor the privilege of recalling the estate, or vesting it in another, without a new

livery. Such a transaction was not consistent with that public notoriety, which was then deemed a necessary circumstance in the alienation of property.¹ The only means which the feoffor had, of retaining any authority over land, after its alienation, was by annexing a condition to the charter of feoffment, that upon the tender of a certain sum of money, or the performance of any other act by the feoffor, or his heirs, as stipulated between the parties, the feoffor should have a right of re-entry; so that the estate which was divested by the feoffment and livery of seizin, might revert in the feoffor, by a strict performance of the condition, and a re-entry upon the land.² But it will be remembered that these conditions were regarded with jealousy by the courts, and a strict compliance with their terms was invariably exacted.³ When, however, the doctrine of uses was introduced, this difficulty no longer existed. Though such shifting of estates was repugnant to the nature of common law conveyances, yet it was perfectly agreeable to the principles and intent of an equitable use, which had, for its main object, the enabling of owners to dispose of their estates in the manner most agreeable to themselves.⁴ On the enactment of the statute of uses, powers of revocation and appointment grew into a system, and thus changed the entire policy of the common law. Such powers were exercised either by the owner of the fee, or of some interest carved out of it, or by a stranger to the estate. In the first case the power was regarded as coupled with an interest, in the

¹ Sugden on Powers, Chap. 1, Sec. 1.

² Powell on Powers, 1-2.

³ Sugden on Powers, Chap. 1, Sec. 1.

⁴ Powell on Powers, 2.

latter it was held to be a mere naked authority. Such was the general nature of common law powers.

In modern times, when a more free and unrestricted power of alienation took place, and the interests of mankind required that the real property of the citizen should contribute to the common burdens of the community, and be subjected to the payment of his debts, involuntary alienations became frequent. The power to sell and convey the estate, to satisfy the charge thus created, was usually vested in some court or public officer. In this manner a class of powers, to which the common law was an utter stranger, have sprang into existence; but which, nevertheless, are controlled, in their execution, by the principles of that law. To that law we are, therefore, compelled to look for analogies in the construction of all statutes which confer power upon strangers, to be exercised over the landed estates of the country. The power to impose a tax upon real estate, and sell it where there is a failure to pay the tax, is a HIGH PREROGATIVE, and should never be exercised in doubtful cases.¹ It is a *naked* power, which, in this instance, may be defined to be a power operating upon an estate, in which the officer who executes it, has no manner of interest, and over which he has no control other than that which the law has expressly delegated to him.²

It is a *statutory* power, depending alone upon the will of the sovereign, and not upon the consent of the owner. The statute creates the power, selects

¹ *Beatty v. Knowler*, 4 Pet. R. 152; *Sharpe v. Spier*, 4 Hill R. 76.

² *Williams v. Peyton*, 4 Whea. R. 77; S. C., 4 Pet. Cond. R. 394; *Varick v. Tallman*, 2 Barbour S. C. R. 113; *Sharpe v. Spier*, 4 Hill R. 86; 4 S. & M. R. 631; *Waldron v. McComb*, 1 Hill R. 111; *Clark v. Courtney*, 5 Pet. R. 319; *Taylor v. Galloway*, 1 Hammond Ohio R. 232; *Hodge v. Wilson*, 12 S. & M. R. 498; *Allen v. Smith*, 1 Leigh R. 231; *Jesse v. Preston*, 5 Grattan R. 120.

the agent to execute it, and prescribes the formalities which shall attend its execution.¹ Judge Sharkey thus defines a statutory power: "A power derived *exclusively and directly* from a statute, without any other agency, or the action of any judicial tribunal."²

It is a *special* as contradistinguished from a *general* authority. The officer to whom it is delegated has no general power to sell land for the taxes charged against it, but simply a special one, to sell in the particular case mentioned in the statute creating the power.³

It will, therefore, be perceived, that the officer entrusted with the power of sale exercises a *naked, statutory and special* authority, depending alone upon the *high prerogative* of the state, and the letter of the law, for its support. Thus much for the nature of the power.

The validity of a tax sale depends upon the *authority* of the officer to sell, and upon the *fairness* of the transaction. It would be going too far to say, that the officer, selling land *with or without authority, could, by his mere conveyance, transfer the title of the rightful proprietor*. He must act in conformity with the law, from whence his power is derived, and the purchaser is bound to inquire whether he has so acted.⁴ It is, therefore, held to be a *condition precedent* to the passing of the title at such sales, that all of

¹ *Doughty v. Hope*, 3 Denio R. 595; *Varick v. Tallman*, 2 Barbour S. C. R. 113; *Sharpe v. Spier*, 4 Hill R. 86; 4 S. & M. R. 630-1; *Hodge v. Wilson*, 12 S. & M. R. 498.

² *Natchez v. Minor*, 10 S. & M. R. 257.

³ *Williams v. Peyton*, 4 Whea. R. 77; S. C., 4 Pet. Cond. R. 394; *Varick v. Tallman*, 2 Barbour S. C. R. 115-16; *Ronkendorff v. Taylor*, 4 Pet. R. 349; *Powell v. Tuttle*, 3 Comstock R. 401; *Sherwood v. Reed*, 7 Hill R. 431; *Striker v. Kelly*, 2 Denio R. 330; *James v. Gordon*, 1 Wash. C. C. R. 335; 4 S. & M. R. 627-8; *Fitch v. Pinckard*, 4 Scam. R. 69.

⁴ *Stead's Executor v. Course*, 4 Cranch R. 403; S. C., 2 Pet. Cond. R. 151.

the proceedings of the officers who have anything to do with the listing and valuation of the land, the levy and collection of the tax, the advertisement and sale of the property, the return, filing or record of the proceedings, whether the acts are to be performed before or after the sale, must be in *strict compliance* with the statute authorizing the sale.¹

¹ *Judevine v. Jackson*, 18 Vermont R. 472; *Early v. Doe*, 16 Howard U. S. R. 610; *Lyon v. Burt*, 11 Ala. R. 295; *Sumner v. Sherman*, 13 Vermont R. 609; *Isaacs v. Wiley*, 12 Vermont R. 677; *Doughty v. Hope*, 3 Denio R. 595; *Shimin v. Inman*, 26 Maine R. 233; *Smith v. Bodfish*, 27 Maine R. 295; *Brown v. Veazie*, 25 Maine R. 362; *Varick v. Tallman*, 2 Barbour S. C. R., 113; *Blake-ney v. Ferguson*, 3 English's Ark. R. 277; *Young v. Martin*, 2 Yeates R. 312; *Shearer v. Woodburn*, 10 Barr R. 511; *Morton v. Reed*, 6 Missouri R. 74-5; *Parker v. Rule*, 9 Cranch R. 64; S. C., 3 Pet. Cond. R. 308; *Ronkendorff v. Taylor*, 4 Pet. R. 349; *Nalls v. Fenwick*, 4 Randolph R. 585; *Yancy v. Hopkins*, 1 Munford R. 419; *Farnam v. Buffum*, 4 Cushing R. 267; *Lessee of Hughey v. Horrell et. al.*, 2 Ham. R. 231; S. C., 1 Ohio Cond. R. 335; *Holt v. Hemphill*, 3 Hammond R. 232; S. C., 1 Ohio Cond. R. 551; *Carlise v. Longworth*, 5 Hammond R. 368; S. C., 5 Ohio R. 229; *Lafferty v. Byers*, 5 Hammond R. 457; *Lessee of Dresback v. McArthur*, 6 and 7 Ohio Cond. R. 307; *Lessee of Perkins v. Dribble*, 16 Ohio R. 433; *Fitch v. Casey*, 2 G. Greene R. 300; *Reed v. Morton*, 9 Missouri R. 128; *O'Brien v. Coulters*, 2 Blackford R. 421; *Dentler v. State*, 4 Blackford R. 258; *Register v. Bryan*, 2 Hawks R. 17; *Pope et. al. v. Headen*, 5 Ala. R. 433; *Scales v. Avis*, 12 Ala. R. 617; *Terry v. Blight*, 3 Munroe R. 270; *Bishop v. Lovan*, 4 B. Monroe R. 116; *Allen v. Smith*, 1 Leigh R. 231; *Wilson v. Bell*, 7 Leigh R. 22; *Jesse v. Preston and Keith v. Preston*, 5 Grattan R. 120; *Thames Manufacturing Co. v. Lathrop*, 7 Conn. R. 550; *Keene v. Houghton*, 19 Maine R. 368; *Cushing v. Longfellow*, 26 Maine R. 306; *Hobbs v. Clement*, 32 Maine R. 67; *Matthews v. Light*, Ibid. 305; *Brown v. Smith*, 7 N. H. R. 36; *Brown v. Dinsmore*, 3 Ibid. 103; *Mason v. Fearson*, 9 Howard U. S. R. 248; *Moore v. Brown*, 4 McLean R. 211; *Jackson v. Esty*, 7 Wendell R. 148; *Culver v. Hayden*, 1 Vermont R. 359; *Hall v. Collins*, 4 Ibid. 316; *Richardson v. Dorr*, 5 Ibid. 9; *Spear v. Ditty*, 8 Ibid. 46; *Bellows v. Elliott*, 12 Ibid. 569; *Isaacs v. Shattuck*, Ibid. 668; *Brown v. Wright*, 17 Ibid. 97; *Carpenter v. Sawyer*, Ibid. 121; *Langdon v. Poor*, 20 Ibid. 13; *Chandler v. Spear*, 22 Ibid. 388; *Taylor v. French*, 19 Ibid. 49; *Wister v. Kammerer*, 2 Yates R. 100; *Burch v. Fisher*, 13 S. & R. 208; *Huston v. Foster*, 1 Watts R. 478; *Foust v. Ross*, 1 W. & S. R. 501; *Porter v. Whitney*, 1 Greenleaf R. 306; *Delogny v. Smith*, 3 Louisiana R. 418; *Morris v. Crocker*, 4 Ibid. 147; *McDonough v. Gravier*, 9 Ibid. 546; *Carmichael v. Aikin*, 13 Ibid. 205; *Alvord v. Collin*, 20 Pickering R. 418; *Brooks v. Rooney*, 11 Geo. R. 427; *Boisgerard v. Johnson*, 23 Miss. R. 122; *Bussey v. Leavitt*, 3 Fairf. R. 378; *Garrett v. Wiggins*, 1 Scammon R. 335; *Graves v. Bruen et. al.*, 11 Illinois R. 437-8; *Hill v. Leonard*, 4 Scammon R. 140; *Fitch v. Pinckard*, Ibid. 69; *Williams v. Peyton*, 4 Wheaton R. 77; *Jackson v. Shepherd*, 7 Cowen R. 88; *Thatcher v. Powell*, 6 Wheaton R. 119; *Irving v. Brownell*, 11 Illinois R. 402.

In the language of Chief Justice Marshall: "That no individual, or public officer, can sell, and convey a good title to, the land of another, unless authorized to do so by *express* law, is one of those self evident propositions to which the mind assents without hesitation; and that the person invested with such a power *must pursue with precision the course prescribed by law*, or his act is invalid, is a principle which has been repeatedly recognized in this court."¹ So strict, indeed, are the decisions in reference to this class of sales, that it has been said that a tax deed is *prima facie void*.² The strictness required in such cases has its origin in that great fountain of the common law which regulates powers. A *special* authority must be strictly pursued; but more latitude is allowed in the exercise of a general authority.³ Where a *general* power is given executors, by will, to sell land, they have a *discretion*, to sell for cash or upon credit; they may select that time which they may regard as most appropriate for the sale, provided there is no unreasonable delay; they may sell at public or private vendue; they may sell it all at once, or at different times; they may sell it *en masse*, or in parcels, to suit the interest of the estate, or the convenience of purchasers, and may adopt such form of conveyance, and such ceremonies in the execution of the title deeds, as they, in the exercise of a sound discretion, may deem proper. All that the law requires of them, is the exercise of good faith, and a due regard to the interests intended to be promoted by the testator. But if, on the other hand, a *special* power is delegated to them; if, for

¹ *Thatcher v. Powell*, 6 Whea. 119; S. C., 5 Pet. Cond. R. 27.

² 4 S. & M. R. 628.

³ *The President, &c., of Natchez v. Minor*, 10 S. & M. R. 264.

example, they are required to sell at a particular time, for cash, at public auction, in particular parcels, by lease and release, or any other prescribed mode of conveyance; or if any other specific directions are given in the will, as to the manner in which the power shall be exercised, all of these become conditions precedent, and must be strictly observed by the executors, or the power is not well executed, and no title will pass to the purchaser.¹ So, where a general power of attorney is given by one person to another, to sell and convey an estate, a discretion is necessarily vested in the attorney, and great latitude is allowed in the exercise of the authority. But if the owner of the estate prescribe in the instrument creating the power, the mode of its exercise, all of the requirements of the warrant must be strictly complied with, or the power does not arise. The powers in both of the cases mentioned, are termed common law authorities.² The same rules apply to the execution of powers of appointment and revocation, which grow out of the statute of uses. Where the power is given *generally*, without defining the mode in which it must be executed, it may be exercised either by deed, will, or a simple note in writing, without even an attestation; and the reason is, that the law treats the instrument by which the power is executed, as a mere appointment or revocation of the use, according to the will of the donor, and if the *intention* to do this, is manifest upon the face of the instrument, it is regarded as a valid execution.³

But there are cases where the power is *special*, in

¹ *Taylor v. Galloway*, 1 Ham. Ohio R. 232; *Loomis v. McClintock*, 10 Watts R. 274.

² Sugden on Powers, 1.

³ Sugden on Powers, Chap. 5, Sec. 2.

which particular circumstances are required to attend the execution of it. "These are generally, first, a particular instrument; secondly, a particular mode of execution; and thirdly, conditions not strictly relating to the instrument, as the consent of third persons, tender of money, or the like." Where forms are imposed on the execution of such a power, it is either to protect the remainder-man from a charge in any other mode, or to preserve the person to whom it is given, from a hasty and unadvised execution of the power. In each case, the circumstances must be strictly complied with; in the first, it would be in direct opposition to the agreement, to consider the estate charged, when the mode pointed out is not adhered to; in the second, to dispense with the solemnities and forms required to attend the execution of the power, is to deprive a man of the bridle which he has thought proper to impose on his weakness or frailty of mind, in order effectually to guard himself against fraud and imposition."¹ The strictness required in the execution of this class of powers, is admirably sustained by the reasoning of Lord Ellenborough, in the case of *Hawkins v. Kemp*.² There, the terms of the power required that the revocation should be by deed or other instrument in writing, executed in the presence of, and attested by, three credible witnesses, enrolled in one of his majesty's courts of record at Westminster, and with the consent and approbation of nine persons, named in the instrument creating the power. The deed executed under this power was not enrolled until after the death of the appointee, but every other requirement had been complied with, and this objection being taken to the deed, it was sustained by the court, the

¹ Sugden on Powers, Chap. 5, Sec. 3.

² 3 East. R. 410.

Lord Chief Justice saying: "Every one of these required circumstances is in itself *perfectly arbitrary*, and (except only as it is in fact required,) *unessential in point of effect*, to the legal validity of any instrument by which old uses should be revoked, or new uses declared. It is, in itself, *immaterial*, whether the instrument in writing, purporting so to revoke and declare the uses, should be by deed; whether such deed should be executed in the presence of what and how many witnesses; whether it should be afterwards attested by the witnesses, and ultimately enrolled in any court of record, and whether it should be sanctioned by the consent and approbation of the several trustees named for that purpose. It might, (if it had so pleased the parties creating the power,) have been done by *any writing* of the persons so authorized, *unsealed, unattested, unenrolled and unsanctioned* by any consent or approbation whatever. If these circumstances be unessential and unimportant, except as they are required by the creator of the power, *they can only be satisfied by a strictly literal and precise performance*. They are *incapable* of admitting any *substitution*, because these requisitions have no *spirit* in them which can be otherwise satisfied; *incapable* of receiving any equivalent, because they are, in themselves, of no *value*."

There is still another class of powers, more closely resembling the power in question, which are created by statute, and depend upon the statute for the mode and manner of their execution, and may, therefore, be properly termed *statutory powers*. Such are sales of land by administrators to pay the debts of an intestate; by guardians for the maintenance and education of their wards; proceedings for the

condemnation of land to public uses, and others of a like nature. Sometimes the power is conferred upon superior courts of general common law and chancery jurisdiction; again upon inferior courts of special jurisdiction, and again upon commissioners, who act in a judicial capacity. In all of these cases the power is *special* and the proceedings are *summary*. If this special authority is conferred upon a superior court of general jurisdiction, which usually proceeds according to the course of the common law, the tribunal is regarded, *quo ad hoc*, as an inferior court with special jurisdiction. The rule applicable to such a power is thus laid down by Justice Caton in reviewing a guardian's sale: "This is a proceeding, not according to the course of the common law, but a special jurisdiction conferred by the statute, and, although in a court of general common law and chancery jurisdiction, yet when a court undertakes to exercise this extraordinary jurisdiction, which is not in conformity with either, it must appear upon the face of the record or proceeding itself that the contingency existed, or at least, was alleged, which authorized it to proceed under the statute and make the order."¹ The language of C. J. Marshall is similar. He says: "In summary proceedings, where a court exercises an extraordinary power under a special statute *prescribing its course*, we think that course ought to be exactly observed, and those facts especially, which give jurisdiction, ought to appear, in order to show that the proceedings are *coram judice*."² In other words, all of the facts which are essential to the exercise of the power, must affirmatively appear upon the face of the record; they cannot be

¹ *Young v. Lorrain*, 11 Ill. R. 636-7.

² *Thatcher v. Powell*, 6 Whea. R. 119; 5 S. C., 5 Pet. Cond. R. 28.

supplied by proof, or made out by intendment. The authorities upon this point are uniform.¹

If, on the other hand, this special authority is conferred upon an inferior tribunal of limited jurisdiction, or upon commissioners, or upon any other individuals who act *quo ad hoc* in a judicial capacity, the rule is still more strict. It is thus laid down. Where a special authority is delegated by statute to particular persons, or to any inferior tribunal, affecting the property of individuals against their will, the course prescribed by law must be strictly pursued, and appear to be so upon the face of the proceedings, or the power is not well executed.² And it makes no difference in the application of this principle, whether the question comes before the superior courts by *certiorari* or *collaterally*. If the law has not been strictly complied with, the proceeding is a nullity, and the adjudication gives it no additional validity. In the case of *Rex v. Croke*,³ which was a proceeding to condemn property for public uses, by the court of Quarter Sessions, before a jury summoned by the sheriff, the statute required that the precept for a jury should be issued on the application of "the Mayor, Aldermen and Commons of London, in common council assembled," and that *notice in writing* should be given to the mortgagee *in possession*, &c. The order of the Quarter Sessions recited an application by the "Mayor, Commonalty and Citizens of

¹ *Zurcher v. Magee*, 2 Ala. R. 253; *Bates v. Branch Bank of Mobile*, Ibid. 689; *Brown v. Wheeler*, 3 Ibid. 287.

² *Smith v. Hileman*, 1 Scam. R. 323; *Sharpe v. Spier*, 4 Hill R. 86; *Rex v. Croke*, 1 Cowper R. 26; *Davidson v. Gill*, 1 East. R. 64, 7 T. R. 363, 1 Burr. R. 377, 4 Burr. R. 2244; *Gilbert v. Columbia Turnpike Co.*, 3 John. Cas. 107; *State v. Scott*, 3 Green Law R. (N. J.) 340; *Levy Court v. Gwynn*, 4 Har. & John. R. 227.

³ 1 Cowper R. 26.

London," that proof of *due notice* had been given to Croke, the defendant, and omitted to state whether Croke was a mortgagee *in or out of possession*. On *certiorari*, the court of King's Bench quashed the order of condemnation, 1. Because of the misrecital of the corporate name of the city of London; 2. Because the record did not set out the notice and aver that it was in writing; and 3. Because the order did not show that the defendant was a *mortgagee in possession* of the land condemned. *Gilbert v. Columbia Turnpike Co.*,¹ was a proceeding to condemn land for the use of the Turnpike Co., under a statute which provided, that in case of a *disagreement* between the company and the owner, the president and directors might apply to one of the judges, or assistant justices, of the court of Common Pleas of Columbia County, *not interested* in said road, and the judge or justice should appoint three commissioners, *freeholders of the county, and not inhabitants of any of the towns through which the road shall pass*. The law further provided that the commissioners should name a day for a hearing, and give the owner four days' notice of their appointment, and of the time and place of meeting, take an oath and proceed to inquire, &c. The inquisition did not recite a disagreement; the non-interest of the judge who appointed the commissioners; that the commissioners were not inhabitants of any town through which the turnpike passed, and that a *written* notice was given to the owner. The inquisition was brought before the Supreme Court by *certiorari*, and quashed for the reasons above named. In each of the preceding cases it will be seen that the question came directly

¹ 3 John. Cas. 107.

before the court, on *certiorari*, to quash the order itself. In *Davidson v. Gill*,² an order was made by two justices of the peace under the 13 Geo. 3, C. 78, Sec. 19, for *stopping up an old foot-way, and setting out a new one*. A schedule was annexed to the statute, giving the *form* of the order, and the statute declared that the form set out in such schedule, "*shall be used on all occasions, with such additions and variations only, as may be necessary to adapt it to the particular exigency of the case.*" The form referred to sets forth the length and breadth of the new or substituted foot-way. The justices omitted to state in their order, the length and breadth of the substituted way. The action was trespass, *q. c. f.*, for breaking and entering the close of the plaintiff. The defendant justified upon the ground that the *locus in quo* was part and parcel of a public foot-way. The validity of the foregoing order of the justices thus came up, the close being parcel of the old foot-way stopped up by them. Judgment was given for the defendant, Kenyon, C. J., saying: "The court are always *disposed* to support, as far as they can, the acts of the magistrates below, but we must take care not to let our wishes carry us *beyond the bounds of law*. The justices have a *limited power* given them under the act of parliament, and it must appear that *this order was made by virtue of that power, &c.* The words of the act are *peremptory*. I cannot, therefore, say that these words are *merely directory*. Power is given to the magistrates to take away, *on certain conditions*, a right which the public before enjoyed, and this is to be done in a *certain prescribed form, &c.* Now here is a material variance in the order, from

² 1 East. R. 64.

the form prescribed, for it does not set forth the length and breadth of the new path set out in lieu of the old one." *Smith v. Hileman*,¹ was an ejectment to recover a parcel of land, which the defendant claimed under a sale made by an administrator to pay debts, in pursuance of the order of the Circuit Court. The statute under which this proceeding took place, required the administrator to set forth in his deed of conveyance, "*the order of the Court at large.*" The deed, in this case, omitted to set forth the order at large, *but recited it substantially*. The court held that no title passed by the deed. Smith, J., in delivering the opinion, says: "The reason of this precision we are not at liberty to inquire into, nor what the supposed necessity may have been, in the opinion of the legislature, for its adoption. It is sufficient to perceive that the *recital of the substance of the order, is not a compliance with, or an observance of the act.* A special power granted by statute, affecting the rights of individuals, and which divests the title to real estate, ought to be strictly pursued, and should appear to be so on the face of the proceedings." The last cases cited arose *collaterally*, and the proceedings, in each case, were treated as nullities.

It will thus be seen that the common law rule which distinguishes between general and special powers, is uniformly and consistently applied by the courts in England and the United States, to every class of powers, whether they are regarded as common law authorities, those deriving their effect from the statute of uses, or *statutory powers*. It has already been shown that the collector, or other officer,

¹ 1 Scam. R. 323.

has no *general* authority to sell land for the non-payment of taxes, but a *special* power to sell in the particular cases prescribed by law.¹ Wherefore it is held that those cases must exist, or the power does not arise; and when it does arise, all of those *formalities*, which the law creating the power has imposed upon its own officers, for the security of private rights, must be faithfully observed in the execution of the power. The power itself, is a *high prerogative*, and the exercise of it, a rigorous proceeding. It divests the owner of his title without his consent, and very often for a *trifling consideration*; and the legislature have usually shown a cautious solicitude to protect the rights of private property, by clogging the exercise of this power with conditions and forms, intended as guards against oppression and fraud.² The doctrine of the common law, which requires that those conditions shall be complied with, and forms strictly observed, more forcibly applies to ministerial officers, charged by statute with the execution of a special authority to be exercised over the estates of individuals, than in those cases where one citizen delegates a special power to another; because those officers are agents, appointed under the authority of the general law, in the selection of whom, the party to be affected by their acts, has no immediate agency, and over whom he has no manner of control. He cannot confer the power upon another, whom he might esteem more worthy of confidence, but must abide the act of the agent of the law.³ Besides, in this class of powers, the govern-

¹ *Ante*, p. 46.

² *Tallman v. White*, 2 Comstock R. 70; *Hughey v. Horrell*, 2 Hammond R. 231; *Farnam v. Buffum*, 4 Cushing R. 267.

³ *Schmidt v. Gatewood*, 2 Richardson Equity R. 170; *Dudley v. Little*, 2 Ham. R. 504.

ment, by its agents, acts in hostility to, and with the view of subverting the title of the citizen, for an alleged breach of its revenue regulations. Under such circumstances the presumption is, that the owner has violated no law—neglected no duty enjoined upon him, which shall have the effect of working a forfeiture of his estate. He waives nothing by silence, stands upon all of his rights, and is permitted to insist upon a strict compliance with all of those conditions which the law has imposed upon its own agents, for their guide in the execution of the power.¹ Another reason assigned for this strictness is, that the power of the officer to sell land for the non-payment of taxes by the owner, is a *naked one*, not coupled with an interest; and in all such cases, whether the power is general or special, the common law requires that every prerequisite to the exercise of the power, must precede it; that the agent must pursue the power, or his act will not be sustained by it.² Judge Scates, in *Hinman v. Pope*,³ well remarks, that “this vigilance of the law upon *naked powers*, is a *substitute* for that vigilance which INTEREST always prompts in those who execute a *power coupled with an interest*.”

Again, proceedings of this kind partake somewhat of a *judicial* character, yet, in point of fact, they are usually *ex parte*, always *summary*, and the notice to the owner is *merely constructive*. The course of the common law in judicial proceedings is thus departed from—that fundamental principle of natural justice which requires actual notice, and an opportunity of a hearing before condemnation, is violated in spirit,

¹ *Varick v. Tallman*, 2 Barbour S. C. R. 113.

² *Vide* authorities cited *ante*, p. 45.

³ 1 Gilman R. 141.

and the owner of the land, under pretense of delinquency, "is disseized of his freehold without the judgment of his peers or the law of the land." It is conceded that the collection of taxes cannot, in general, be made by *ordinary suits*, and that the proceedings, in such cases, must, of necessity, be *summary* and *ex parte*. But this very necessity begets another, that in the execution of such a power, the law shall be strictly and punctiliously complied with, in all of its requisitions.¹ This rule is applied to all summary proceedings prescribed by statute, where the accustomed course of the common law is departed from.² And here it may be remarked, that the common law enters largely into the construction of every statute. A just interpretation is ever controlled by that law.³ It is said to be the best construction of a statute to expound it as near to the rule and reason of the common law as possible, and by the *course* which that law observes in similar cases.⁴ The reason assigned by Chancellor Kent for this rule of construction, is thus stated: "For it is not to be presumed the legislature intended to make any innovation upon the common law, further than the case absolutely required. This has been the language of the courts in every age, and when we consider the constant, vehement and exalted eulogy which the ancient sages bestowed

¹ *Morton v. Reed*, 6 Missouri R. 64.

² *Levert v. P. & M. Bank*, 8 Porter R. 104; *Logwood v. P. & M. Bank*, 1 Minor Ala. R. 23; *Yancy v. Hopkins*, Ibid. 171; *Crawford v. State*, Ibid. 143; *Bates v. P. & M. Bank*, 8 Porter R. 99; *Judson v. State*, 1 Minor R. 153; *Zurcher v. Magee*, 2 Ala. R. 253; *Bates v. Branch Bank of Mobile*, 2 Ibid. 689; *Brown v. Wheeler*, 3 Ibid. 287.

³ 10 John. R. 586.

⁴ *Dwarris on Statutes*, 695; 1 P. Wms. 252; 1 Saund. R. 240; 10 John. R. 579; Doug. R. 27; 1 Burr R. 445; 1 Kent, 464; 6 Bac. Abr. 383; Co. Litt. 272, b; *Stowell v. Zouch*, Plowden, 365; *Heydon's Case*, 3 Co. R. 7; *Vernon's Case*, 4 Co. R. 4.

upon the common law, as the perfection of reason, and the birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction."¹ The Chancellor, after stating that "we cannot be surprised at the great sanction given to this rule," because it was regarded "as the birthright and noblest inheritance of the subject," might have added, that the rule was not only venerable and patriotic, but that it was founded in the common sense of expositors. In construing a new law, we *instinctively* look to the old one which is superseded, or repealed. To use the quaint and expressive language of Lord Coke: "In construing a statute we must look to the old law, the mischief and the remedy." No judge, however acute, can properly construe a new law, without knowing what the old law was. This seems a self-evident proposition. When a word is used in a statute, which has a well-known and definite meaning at common law, it is presumed that the legislature used it in that sense, and it should be so received and expounded by the courts.² When a power is given by statute, but the means of its execution are not prescribed, the power must be executed according to the course of the common law. Where the provisions of a statute are *general*, it is subject to the control and order of the common law; in other words, the statute is to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in the common law,

¹ 1 Kent's Com. 464.

² 6 Bac. Abr. 383; 6 Mod. R. 143; *Mayo v. Wilson*, 1 N. H. R. 555-6; *Bedell v. Janney*, 4 Gilman Ill. R. 205-6; *Adams v. Turrentine*, 8 Iredell R. 147; Dwarria on Statutes, 696.

further or otherwise, than the act *expressly declares*.¹ This doctrine is expressly affirmed by the statute of Illinois, which declares that "the common law of England, &c., shall be considered as of full force, *until repealed by legislative authority*."² Where a right is given by statute, but no remedy to enforce it, the common law remedy may be adopted; and where a new remedy is given to enforce a right, or redress a wrong, recognized by the common law, and there are no negative words in the statute, the party injured has an election to proceed under the statute, or at common law. And lastly, when a statute makes an innovation upon the established principles of the common law, it must be strictly construed in all cases.³ Thus, in every view, the rules of the common law, in relation to special and naked powers and summary proceedings, are peculiarly applicable to those officers of the law who, under the authority of general statutes, sell land for the non-payment of taxes. There are other reasons, equally, if not more weighty, why those officers should strictly conform to the requirements of the law. The chief purpose of government is the protection of life, liberty and *property*; and this is a fundamental principle in our free constitutions. The bill of rights attached to every one of them, declares, that the "*acquisition, possession and protection of property*," is one of the *inalienable* rights of every citizen. A *speedy and complete remedy, by due course of law*, for all invasions of property, is guaranteed to him. He is protected in the enjoyment of his property from the encroachment of every department of the government, by

¹ 6 Bac. Abr., Title "*Statute*," 383-4.

² R. S. 1845, p. 337, Sec. 1.

³ 16 John. R. 7; 2 Gilm. R. 184 and 429; 4 Bin. R. 116.

those limitations which have been imposed by the Constitution upon the taxing power; by that provision which prohibits the taking of private property for public uses, without due compensation, and by the further declaration that he shall not be "disseized of his freehold, or *in any manner* be deprived of his property, without the judgment of his peers or the law of the land." Not even a conviction for the highest crime known to the law, can have the effect of working a forfeiture of his estate. Thus the mantle of the Constitution and laws is thrown around the property of the citizen, to shield it from public or private invasion. The *spirit* of these great fundamental principles, therefore, requires that when the *high* power of selling the estates of delinquent tax payers is delegated to a subordinate officer, all of those conditions, checks and forms, which the legislature have seen proper in their wisdom to prescribe, with a view to prevent fraud, oppression and injustice in the execution of the power, should be observed by the officer in letter and spirit. It is a maxim of the law, that every statute ought to be so construed as to preserve unimpaired, fundamental principles.¹ The evident intention of the legislature in the enactment of this class of laws, is to coerce the payment of taxes from the unwilling, and at the same time to protect the rights of private ownership as guaranteed by the fundamental principles of our institutions. The former object is accomplished by the sale of the delinquent's land; the latter by those conditions and forms, with which the officer is bridled and restrained in the execution of the power of sale. A double—a general and particular—intent is thus

¹ 1 Pet. Cond. R. 425; 8 John. R. 41.

manifested in all such laws, both of which should be sacredly respected, and carried out by the courts in construing them; the true principle applicable in all such cases, being that the private interest of the citizen is never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance; nor should the power be exercised in any other mode than that specially pointed out by the statute.¹ As a matter of public policy, tax sales should not be sustained, unless the laws are shown to have been complied with. In the varied transactions of men, *absolute* punctuality in the payment of taxes is impossible. *Misfortune, disease and death* prevail in every community, and interrupt the performance of the duties of the citizen toward the government of his choice. A mere *oversight* of the owner, and not a willful and perverse disposition, may have been the occasion of the failure to pay the tax.² But for the rule of strictness required by the courts in this class of powers, great injustice would oftentimes be done, and innocent persons lose their estates. The taxes may have been paid, and by accident the evidence of the payment may be lost to the owner. The officer entrusted with the collection of the tax may have neglected to make a personal demand upon the tax payer. Guardians of the estates of infants; executors in whom the estate is vested by will, charged with the execution of a power over it; agents entrusted with the payment of the tax, and tenants for life, who enjoy the profits of the estate, may fail to pay the taxes assessed; the collector himself may, by mistake, return one as de-

¹ Broom's *Maxims*, Second London Edition, 1848, pp. 3-4.

² *Mason v. Fearson*, 9 Howard U. S. R. 248; Counsel Arguendo in *Kenper v. McClelland*, 19 Ohio R. 324.

linquent who is not so in point of fact. These, and many other cases, which will readily suggest themselves to every person at all conversant with these tax sales, oftentimes happen, and the estates of innocent persons are thus divested without their knowledge. The bare possibility that the power to sell may be abused, and injustice done in such cases, ought to require at the hands of the court, a strict construction of, and literal compliance with the law. That no statute ought to be so construed as to *work injustice*, nor so that an innocent man may be *punished or endangered*, are maxims of the common law.¹

There is another principle of construction which may be properly applied in this connection. It is thus laid down by Lord Holt: "*Let a statute be ever so CHARITABLE, if it give away the property of the subject, it ought to be construed strictly.*"² Let it be remembered that the statute to which Holt applied this rule of construction, was a statute discharging insolvent debtors *from imprisonment*; the ordinary rule is, that in cases involving *personal liberty*, if a statute *extends* it, you are to construe it *liberally*; if it *restrains* liberty, then construe it *strictly*.³ If you sell the land of one who has paid the taxes due upon it, you *give it away*, and have not even the plea of *charity* as a justification or excuse for your conduct. There is still another rule of law which may be properly applied to powers of this character. Where a statute creates a *new power*, and at the same time provides the *means and mode* of executing it, those to whom the power is entrusted, can execute it only in the

¹ Co. Litt. 360 a; 7 John. R. 482 and 495-6.

² 6 Bac. Abr. 389; 12 Mod. R. 513.

³ 12 John. R. 373.

mode prescribed.¹ This rule requires a rigid adherence to the directions and forms which the legislature have seen proper to lay down for the government of its agents. The power is *purely arbitrary*, and this furnishes a strong reason why it should not be exercised in an *arbitrary manner*. If the forms required to be observed are once departed from, there is an end of all legal restraint, and the *discretion* of the officer is bounded by his will alone. This would be intolerable to a free people. No court would venture to sanction a doctrine which would operate to vest such an unbounded discretion in any officer. Discretionary power is contrary to the genius of our laws and institutions. To sustain a tax sale, where the officer, in the exercise of his discretion, has disobeyed the rule laid down by the statute for his government, is to transfer the legislative power of the State to the collector, and thus allow him to sell land for taxes, not in the manner prescribed by the written law, but according to his private notions of what is right, and would place at his discretion the property of every citizen of the State.² Again, the estate of the purchaser is an acquisition by operation of law. The power is created by statute, the officer authorized to make the sale is appointed by law, and the time, place and manner of sale are prescribed by the law. *The estate, therefore, depends upon the law for its validity, and not upon the consent of the former owner.* Now, it is difficult to perceive how any one claiming title to land, under a statute which points out the manner of acquisition, can establish that title in a court of jus-

¹ 6 Mass. R. 44; 14 Mass. R. 289; 1 Blackford R. 39; 1 Missouri R. 428; *State v. Cole*, 2 McCord R. 117.

² *Register v. Bryan*, 2 Hawkes R. 17.

tice without proving the existence of all those acts which the law has prescribed as conditions precedent to its validity. The law is the foundation of the title—it is the power of attorney of the officer who makes the sale. Therefore, a person claiming under the statute, must not only show the power, but a compliance with all of its terms or requirements. It is a general principle, applicable alike to all political organizations, that every citizen is bound to take notice, at his peril, of the law of the land; that ignorance of its existence is no excuse for disobeying its mandate, and that however ambiguous it may be, consequences arising from an erroneous construction of it, cannot be averted, either at law or in equity. When, therefore, a party claims title under a public law, he is not only bound to know the law, and give it a fair and reasonable construction, but he is bound to see that all of its substantial requirements have been complied with. “A special authority must be strictly pursued, and every purchaser is to be presumed to know *that special authority* in all cases where it is conferred and limited by statute.”¹ The law has a two-fold object. It was not designed simply for the purpose of prescribing the authority of the officer to sell, “but also to give to purchasers full information of the terms upon which a title could be acquired to land sold for the non-payment of taxes.” It was meant to put bidders at a tax sale upon inquiry, whether or not the land was offered for sale according to law. If they do not examine, and shall buy land exposed to sale for taxes against the law, they do so at their own risk; and it will be presumed against them, that

¹ *Dunning v. Smith*, 3 John Ch. R. 344.

they know that the deeds given under such circumstances, are made in violation of official duty and of the law.¹ This is in accordance with the well settled principle, that whenever one man presents himself as the agent of another, it is the duty of all who have any transactions with him in his representative character, to inquire into the extent of his authority, and they deal with him at their peril.² The fact that the agent is a *public*, instead of a *private* one, and that his authority is conferred by a statute, instead of a writing upon parchment or foolscap, can make no essential difference in the application of the principle.

There is another rule equally well settled, that every person claiming title to real estate, is chargeable with notice of all defects apparent upon the face of his muniments of title.³ In tax titles, the constitutional provisions regulating the taxing power, the statute levying the tax, and prescribing the manner of enforcing its collection, and the acts of those to whom the execution of the power is entrusted, are all essential links in the chain of title—all of them are matters of record—and the purchaser is bound to take notice of all omissions or irregularities, which have taken place in the proceedings under which he claims the estate. He is, therefore, to look to it at his peril. The maxim, *caveat emptor*, applies to him with great force.

Again, the consideration usually paid for a tax title, is *grossly inadequate*. These sales "are attended with greater sacrifice to the owners of land than any others. Purchasers seem to have but little con-

¹ *Moore v. Brown*, 11 Howard U. S. R. 414.

² 1 J. J. Marshall R. 287.

³ *Battimore v. White*, 2 Gill. & John. R. 444.

science. They calculate upon obtaining acres for cents, and it stands them in hand to see that the proceedings have been strictly regular."¹ In *Moore v. Brown*,² Judge Pope says: "A strict construction has always been given to tax titles. It is necessary that, at least, the requisites of the law through which an individual is divested of his title, should be substantially complied with. We see the necessity of this rule in the case under consideration. Three hundred and twenty acres of land have been sold for less than twenty dollars. If such sacrifices can be made where there is a departure from the requirements of the law, there is no safety to the owners of real estate." In *Farnam v. Buffum*,³ Judge Wilde remarks: "In a sale like this, where a large and valuable property has been sold for a *mere trifle*, a compliance with all the provisions of the statute *should be proved with great certainty in every particular*." In *Reed v. Morton*,⁴ the Court, in speaking of the neglect of the tax purchaser to record his certificate, as required by the statute, say: "We do not feel ourselves called upon to give *reasons* why this thing should have been done. He who wishes to obtain an estate *worth thousands, for less than ten dollars*, under and by virtue of the law, is not to be permitted to ask why he should be required to do this, or to do that. *It is an answer that is required by law. Ita lex scripta est*. He claims by the law, then by that law let his pretensions be judged." And in *Mayhew v. Davis*,⁵ the Court remark: "The defendant claims to hold the land in controversy, valued

¹ *Lessee of Hughey v. Horrell et. al.* 2 Ham. R. 231; S. C., 1-4 Ohio Cond. R. 335.

² 4 McLean R. 211.

³ 9 Missouri R. 878.

⁴ 4 Cushing R. 267.

⁵ 4 McLean R. 213.

by an assessor at nine hundred and sixty dollars, by virtue of a sale at which he paid less than five dollars for it. This, then, is a claim of *strict right*, where a court would not grant a new trial, nor would a chancellor enforce such an unequal bargain." Not only will a court of equity refuse relief to the purchaser, but even a court of law will not lend its aid. There is a strong case in support of this position. The New York Statute authorized the sale of a leasehold interest in lands for the non-payment of taxes assessed upon them, prescribed the course to be pursued, and declared that the lease should be *conclusive evidence* of the regularity of the proceedings. Some defect occurred in the proceedings, and the officer discovering it, refused to execute a lease, as required by law, and the purchaser applied for a mandamus. The court denied the application, saying: "Should we *compel* the execution of the lease, the purchaser's title *might be protected*; but we are not *inclined* to exert this *high power* of the court to give *strength and validity* to a title which appears *clearly defective on the merits*, and which, *without this statutory support, cannot be sustained*."¹ Another reason assigned for this strictness is, that the statutes under which lands are sold for taxes, are *highly penal* in their character; so much so that a man may absolutely lose his whole estate for a few days' neglect in the payment of a tax, which never exceeds the one hundredth part of the sworn valuation thereof. Now the rule is clearly established, that penal laws of every description are to be strictly construed, and nothing therein is to be taken by implication or intendment.² That such statutes are *strictly* penal,

¹ *People v. Mayor, &c.*, 10 Wendell R. 395.

² *Yancy v. Hopkins*, 1 Munford R. 419, 437.

will be apparent upon a review of the authorities.¹

Another view may be taken of this subject. The execution of a power relating to an estate, is the exercise of an act of ownership over that estate. Such acts can only be justified and sustained, where the consent of the owner, either express or implied, has been previously obtained. This consent is evidenced by a written authority from the owner of the estate, or positive law, to the enactment of which he is presumed to have assented. But the disposition of mankind is to use great caution in permitting strangers to exercise such acts of ownership over their estates; and in almost every instrument or statute conferring such power, restrictions are imposed upon the donee, as to the mode of executing it. These restrictions are intended for the protection of those having an interest in the property. The title, in such cases, is derived from the power itself. The instrument made in execution of the power, does not derive its validity from its capacity, as an independent or distinct conveyance, to pass the estate, which is the subject of the power, but from its correspondence with the forms required by the creators of the power, to attend the execution of it. The conveyance must bear upon its face an acknowledgment of the power; and for the purpose of upholding the act, and preventing an intervening right from attaching to the subject matter of the power, the act done in pursuance of the power, relates back to the time when the power itself commenced its existence. When, therefore, a person claims an estate, purporting to be derived under a power, he must prove the existence of the power,

¹ Smith's Commentaries, C. 18, Sec. 738, p. 854, and cases there cited.

and a compliance with all of its requisitions. This rule pervades all classes of powers, and is universal in its application. In this country especially, all constitutional and statutory powers are *limited*, and every act done by persons assuming to act in an official capacity, are nullities, unless the power exists, and the mode of exercising it has been adhered to by the officer. The rule applies to the legislature itself. The Constitution of Illinois confers upon the General Assembly the power to enact laws, but declares that no bill shall become a law until it shall have been read three several times in each house, and received the assent of a majority of all the members elect; this assent to be manifested by yeas and nays, to be entered of record upon the journals of the respective houses. Where these requirements were not complied with, the act was held not to be a law of the land.¹ The judicial power is vested in the courts of justice, but they are limited by law as to the subject matter, etc., and the mode of acquiring jurisdiction is prescribed by law. If they render a judgment or decree against the citizen, in a case over which they have no jurisdiction, or without bringing the party into court in the manner prescribed by law, the act is a nullity. The act of every executive officer, from the President down to a town constable, is void where he has no authority, or proceeds contrary to the mode prescribed by the Constitution and laws. The *security* to the citizen in the observance of the forms prescribed by law, consists in the *deliberation and solemnity* which attend them; and the frequency of their occurrence is a monitor which reminds the officer of the effect of

¹ *Spangler v. Jacoby*, 14 Ill. B. 297.

his power, and the necessity of a strict compliance with the terms of it.

Again, it may be laid down as a general principle, subject to no exceptions, that the validity of every involuntary alienation of land, depends upon a strict compliance with all of the substantial requisitions of the law by which they are authorized, such as the taking of private property for public use;¹ the extending of an execution upon the land of a debtor, in the New England States;² the sale of land by a guardian, under an order of court,³ and also sales made by administrators, of the real estate of their intestate.⁴

The last and most convincing reason why every requirement of the law should be strictly complied with by the officer, in the sale of land for the non-payment of taxes, is to be found in the fact that "THUS THE LAW IS WRITTEN." Where the words of a statute are *plain* and *unambiguous*, there is no necessity for resorting to technical rules of construction, but the legislative will, as expressed, must be obeyed.⁵ When there is doubt and ambiguity in the language used, then everything which serves to assist in ferreting out the intention of the maker, may be resorted to. This is the point where interpretation commences. There is another rule of law on this subject: that a statute ought to be so construed, that *no clause, sentence or word shall be superfluous, void, or*

¹ *Flatbush Avenue*, 1 Barbour S. C. R. 286.

² *Wellington v. Gale*, 13 Mass. R. 483; *Metcalf v. Gillett*, 5 Conn. R. 400; *Morton v. Edwin*, 19 Vermont R. 77; *Sergeant v. Pierce*, 2 Metcalf R. 80.

³ *Young v. Keogh*, 11 Ill. R. 642.

⁴ *Smith v. Hileman*, 1 Scam. R. 323; *Atkins v. Kinman*, 20 Wend. R. 241.

⁵ 3 Scammon R. 161; 2 Peters R. 662; 3 A. K. Marshall R. 489; 1 Pick. R. 45 and 250; 9 Porter R. 266.

insignificant, if it can be prevented.¹ These two rules, that *every word* must have *effect*, and that where the words are plain, there is nothing to construe, put an end, in every case, to *judicial discretion*. The legislature commands, and the judges must obey. It is astonishing that these plain, common-sense maxims should ever have been departed from by the courts in the application of *statute law*, to cases brought before them for adjudication. The intention of the legislature, it is true, must control in all cases, but that intention is to be collected from the words of the act. A sound construction must always be warranted by the words, and never repugnant to them. Where the legislature have used words of a plain and definite import, it would be dangerous to put upon them a construction which would amount to holding that the legislature did not mean what they have expressed.² This would be imputing to the legislature, useless and frivolous conduct, which is never lawful in construing their acts.³ Judges are not to *presume* the intention of the legislature, but collect it from the words of the act, and they have nothing to do with the policy of the law. This is the true sense in which it is so often impressively repeated, that judges are not to be encouraged to direct their conduct "by the *crooked cord of discretion*, but by the *golden met-wand of the law*," i. e., not to construe statutes by equity, but to collect the sense of the legislature by a sound interpretation of the language, according to reason and grammatical correctness.⁴ The most enlightened and experienced judges have, for some time, lamented the too fre-

¹ 6 Bac. Abr. 380.³ 1 Pick. R. 482.² 7 B. & C. 569; 6 B. & C. 712.⁴ 2 Dwaris, 703.

quent departure from the plain and obvious meaning of the words of the act by which a case is governed, and themselves hold it much the safest course to adhere to the words of the statute, construed in their ordinary import, than to enter into any inquiry as to the supposed intention of the persons who framed the act.¹ "It is safer," says Mr. Justice Ashurst, "to adopt what the legislature have *actually* said, than to suppose what they meant to say."² In the case of *Hardin v. Owings*,³ an appeal was taken from the Circuit to the Court of Appeals; the appeal bond was executed by the appellant in the presence of the deputy clerk, but the surety did not execute in the clerk's office, or in the presence of the clerk. The statute relating to such appeals expressly required that the bond should be executed in the office of the clerk of the inferior court. A motion was made to dismiss the appeal because the bond was not executed in conformity with the law, which was sustained by the court. Edwards, C. J.: "We are clearly of opinion that the bond should be executed in the office, and to prove this, nothing more would seem to be requisite than the plain and unambiguous language in which this mode is prescribed by the legislature. The legislative body is the supreme power of the State, and whenever it acts within the pale of its constitutional authority, the judiciary is bound by it; and it is not competent to the latter tribunal to dispense with a regulation or requisition plainly prescribed by the former, (its superior,) or to say that this mode, that or the other, is as good as the one prescribed by the legislature; for this, in fact, would be placing the judiciary above

¹ 10 B. & C. 527.² 1 T. R. 52.³ 1 Bibb R. 214.

the legislature, by enabling the former to nullify the acts of the latter, or to supersede them by substitutes to which the legislature might not have assented had the proposition been submitted to it. If we can say that though the legislature has required the appeal bond to be executed in the office, it is sufficient if executed out of the office before private individuals, and afterwards be deposited in the office, why might we not also say, that though required to be executed in the office of the inferior court, it is sufficient if executed in the office of this court? One set of judges might think the former would be a sufficient compliance with the legislative intention; another set, adopting the principle that they had a right to depart from the words of the act, might think the latter a sufficient compliance, and a third set, adopting this course of reasoning, viz: that as the legislature was competent to command, it ought to be obeyed, and having commanded the thing to be done in one way, all other ways were excluded, they might think themselves bound to decide upon the words of the act itself; and thus, among them, produce that uncertainty which has hitherto, and with too much justice, been the reproach of the law. Besides, therefore, being a point of duty, it is much safer to make the law itself the rule of action, when it is plain and intelligible—it is best calculated to produce uniformity of decision, and to cause it to be understood by the mass of the people, on whom it is designed to operate. In general, the law is plain enough according to the letter of it; men of very ordinary capacities are capable of understanding it; but there have been so many subtle, refined and artificial rules of construction devised by inge-

nious lawyers, and adopted by supple courts, in explaining a legislative act, or supplying the defect of a party in bringing himself within its provisions, that in many instances a man of good judgment and of considerable legal science, cannot anticipate what decision courts will give on the plainest statute. There is not a lawyer but knows that the most abstruse and doubtful part of legal science has arisen from the cause above-mentioned. Witness the various and irreconcilable decisions under the statute of limitations, the statute of frauds and perjuries, &c. One judge has at one time declared, that to admit certain constructions of a particular statute, would amount to a virtual repeal of it; another judge, of precisely the same grade, and sitting on the same judicial seat, at another time has declared that the very same were legitimate constructions, and fairly deducible from the statute itself; and thus have judicial decisions (the evidence of the law,) been rendered uncertain and vibrating according to the whim, caprice or judgment of different men, who all had an equal right to judge. They have made the legislature mean anything, everything, and almost nothing, as suited the particular case before them; and this will ever be the case whilst this arbitrary field of discretion is assumed and exercised by judges, and until the acts of the legislature, according to their plain and obvious import, unembarrassed by mere technical and artificial rules, are made the proper and governing rules of decision. If the law should prove to be defective, inadequate to the object of it, or oppressive in its operation, it is certainly more peculiarly the province of the legislature than the judiciary, to supply or

remedy those defects. In the judiciary, the exercise of such a power is not warranted by the constitution, under which we act; it is contrary to it, and must, therefore, be an unjustifiable assumption of power. Opposed to all this reasoning, is the very *convenient* and *pliable* common law maxim, *qui hæret in litera, hæret in cortice*, (he who considers merely the letter of an instrument goes but skin-deep into its meaning,) a maxim which, *under great limitations*, may be correct and not without its use, but which, according to the expanded ground it has been made to occupy by some judges in England, is not only *intrinsically* incorrect, but of the *most dangerous tendency*, because it *renders perplexed the rules of decision*, it *enlarges an arbitrary discretion in judges*, and *encroaches on legislative authority*. It is congenial enough to arbitrary governments, where the judiciary becomes the engine of the court; in such governments it furnishes the judges with great facilities in subserving the views of the court, or others whose interest they may be disposed to promote. Nothing is more easy than to decide to-day that such is the spirit of the law, such was the intention of the legislature, such alone the evil intended to be remedied; in a short time the subject may present itself in a point of view a little varied from the former one; and finally, the judges may return to the law, and enforce it according to the letter of it, and nothing is more natural, and many times nothing is more just, than the apology, '*humanum est errare*.' But insomuch as the principle is adapted to arbitrary governments, in just so much it is uncongenial and dangerous to ours, and therefore it ought to be circumscribed within a very narrow compass; to effect which, this court has recently, in several instances, gone great lengths, and

probably may find it necessary to go still farther. In the present case, the rule prescribed by the legislature is a plain and intelligible one; the party who claims the benefit of the law could have pursued it; if he did not choose to do so, the court ought not to aid his negligence, and supply the defect by adopting a perplexed and doubtful system of adjudication, and interposing an illegitimate dispensing power over the acts of the legislature. The legislature, as before premised, has declared that the bond should be executed in the office; it had the right so to declare; we have no power to nullify the act, or to supersede it by a substitute. We, therefore, must say '*ita lex scripta est*,' and the defendant, in this motion, must be bound by it." This reasoning is most convincing, and deserves to be accompanied with the judicious and sensible remarks of Judge Hebard: "I am not very well satisfied with the *summary* mode of *getting rid* of a statutory provision, by calling it *directory*. If *one positive requirement* and provision of a statute may be avoided in that way, I see no reason why another may not."¹ Mr. Justice Morton also remarks: "Equitable constructions, though they may be tolerated in remedial and, perhaps, some other statutes, should *always* be resorted to with *great caution*, and *never* extended to penal statutes, or mere *arbitrary regulations* of matters of public policy. The power of extending the meaning of a statute beyond its words, and deciding by the equity, and not the language, *approaches so near the power of legislation*, that a wise judiciary will exercise it with *reluctance* and only in *extraordinary cases*."² This doctrine is daily gaining ground, and it is to be hoped that the day is not far

¹ 15 Vermont R. 72.² 22 Pick. R. 387.

distant, when our courts will adopt the maxim of the Missouri Court: "*Thus the law is written, and we do not feel called upon to give reasons why it is so.*"¹ The principle has been repeatedly applied in the construction of statutes authorizing the sale of land for taxes, as will be shown hereafter, in treating of each particular requirement of the revenue laws. It will thus be seen that the nature of the power, the character of the proceedings, the spirit of the Constitution, the letter of the law, and the true principles of interpretation, all concur in requiring *strictness* in the execution of this class of powers. The officer is the agent of the law, the statute is his *warrant of attorney*, and he is bound to conform strictly to it. Let this branch of the subject be dismissed with the remarks of the court in *Powell v. Tuttle*:² "It is a familiar rule of law that a *special authority* must be *strictly pursued*. When such authority is *prescribed by statute*, and when in its exercise it *operates to divest the citizen of his property*, courts cannot be too *sedulous in confining it within the boundaries which the legislature have thought fit to prescribe*. At this day, and in this country especially, *the protection of private rights demands this safeguard*; and he who will review the adjudications of our courts involving this principle, will be interested to observe *with what uniformity and unceasing jealousy, the exercise of such a power has been restricted to its own specified limits.*"

In concluding this chapter, a few general remarks in regard to the *degree of strictness* required in these cases, may not be deemed inappropriate. One judge remarks that the proceedings must be "*strictly regular.*"³ Another, that "*a strict compliance with all the*

¹ *Reeds v. Morton*, 9 Missouri R. 878.

² 3 Comstock R. 401.

³ *Hughey v. Horrell*, 2 Ohio R. 231.

prerequisites of the statute is considered necessary."¹ Another, that "GREAT *strictness* is required, and every *substantial* requisite of the law must be shown to have been complied with."² Another, that "It must appear that the provisions of law *preparatory to, and authorizing* such sale, have been *punctiliously* complied with."³ Another, that "*a minute conformity to every particular of the several acts of the Assembly*, is necessary to pass the title."⁴ Another, that without a "*literal performance*" of the requirements of the law, the deed is "*mere waste paper*."⁵ Another, that "the authority must be *strictly* pursued from the *beginning to the end*. If *any material link in the chain* be wanting, the *whole proceeding will fall to the ground*."⁶ Another, that "In order to make a good title to land under a sale for taxes, *great strictness* has always been required in the observance of statute requirements. It has sometimes been said that a *literal compliance* with the statute provisions, by all the officers connected with the proceedings, is a condition precedent to the passing of any title. Perhaps the term *literal*, in its confined sense, is *rather too strong*. A CLEAR AND STRICT COMPLIANCE *has always been held indispensable*, even in regard to matters *which, but for the statute, would appear to be of no importance*."⁷ Another, that the person invested with the power to sell, "must pursue with PRECISION *the course prescribed by law, or his act is invalid*." Again, the course prescribed "ought to be

¹ *Isaacs v. Wiley*, 12 Vermont R. 677; *Smith v. Bodfish*, 27 Maine R. 295.

² *Blakeney v. Ferguson*, 3 Eng. R. 277; *Ronkenlorff v. Taylor*, 4 Pet. R. 349.

³ *Brown v. Veazie*, 25 Maine R. 362.

⁴ *Young v. Martin*, 2 Yates R. 312; *Shearer v. Woodburn*, 10 Barr R. 511.

⁵ *Bush v. Davidson*, 16 Wendell R. 554.

⁶ *Doughty v. Hope*, 3 Denio R. 599.

⁷ *Langdon v. Poor*, 20 Vermont R. 15.

EXACTLY observed."¹ Another, that "a tax deed cannot be read in evidence, without proof that the SUBSTANTIAL *requirements* of the law have been complied with."² Another, that "it is a condition precedent to the passing of any title, that the proceedings of the officer should be in STRICT AND LITERAL compliance with the requirements of the statute."³ And another, that every requirement of the law, "having the SEMBLANCE OF BENEFIT to the owner, must be strictly complied with."⁴ These quotations are extracted from the *general* language of courts in giving their opinions in particular cases, and of course, are to be understood with reference to the subject matter before them. The particular objections taken by counsel, and sustained by the court in those cases, will appear in their appropriate places hereafter. This general language, however, serves to show "with what *uniformity* and *increasing jealousy* the *exercise of such a power* has been *restricted* to its own *specified limits*."⁵ The principle fairly deducible from the entire field of discussion upon this class of powers, is, that *every* requirement of the law, whether *substantial* or merely *formal* in its character, and having the *semblance* of benefit to the owner, which the legislature have said shall attend the execution of the power, ought to be strictly observed by the officers entrusted with its execution, or no title will pass by the sale. In the language of Lord Ellenborough: "If the circumstances be *unessential* and *unimportant*,

¹ *Thatcher v. Powell*, 6 Wheaton R. 119.

² *Games v. Stiles*, 14 Peters R. 322.

³ *Judevine v. Jackson*, 18 Vermont R. 472.

⁴ *Sharp v. Johnson*, 4 Hill R. 99; *Corwin v. Merritt*, 3 Barbour S. C. R. 343; *Atkins v. Kinman*, 20 Wendell R. 249; *McDonough v. Gravier*, 9 Lou. R. 546.

⁵ *Powell v. Tuttle*, 3 Comst. R. 401.

except as they are required by the creators of the power, they can only be satisfied by a strictly literal and precise performance. They are incapable of admitting any substitution, because these requisitions have no spirit in them which can be otherwise satisfied; incapable of receiving any equivalent, because they are in themselves of no value."¹ Similar language is used by the Supreme Court of Vermont, in reviewing the strictness required in tax sales: "It is enough for us to inquire what the legislature *have said*, supposing that their *intentions* were made known by the *terms they have used*, and not *indulge* in any *fanciful conjectures* as to their *meaning*, or to *substitute something else* in lieu of what *they have enacted*."² In noticing an omission of the officer, contrary to the literal import of the law, the Supreme Court of Maine say: "This may not have been productive of *any inconvenience* to those interested in their doings, but it was a *departure* from the line of duty marked out for them to pursue, which may be regarded as, in *strictness*, affecting the *authority* of the collector to make sale of the premises."³ The Supreme Court of Massachusetts, in speaking of one of the requirements of law, say: "If we could discover neither the necessity nor use of this provision of the law, *it would not be for us to dispense with it*."⁴ In *Isaacs v. Wiley*,⁵ the collector failed to give a bond as required by law, and for this defect in the proceedings, the sale was held void; the court remarking: "We hold the giving of a bond, and such a bond as the statute requires, to be *indispensable to pass* the title, not because we consider that the public or

¹ *Hawkins v. Kempe*, 3 East. R. 410.

² *Sumner v. Sherman*, 13 Vermont R. 612.

³ *Brown v. Veazie*, 25 Maine R. 359.

⁴ *Little v. Thurston*, 3 Mass. R. 432.

⁵ 12 Vermont R. 677.

the land-holders have any *indirect* interest even in the security which it affords, *but because a strict compliance* with ALL the prerequisites of the statute is considered *necessary*, in this class of cases, in order to pass the title." Perhaps the very strongest illustration of the strictness required in these cases, is to be found in the case of *Brown v. Dinsmore*.¹ There the question was whether, in listing the land for taxation, the name of the owner *or* the description of the land, *or* both, should be inserted in the list. Such was the language of the statute, that it was susceptible of either construction; and the court held that the insertion of both the name and description was necessary. Thus much with regard to the degree of strictness required in tax sales.

¹ 3 New Hampshire R. 103.

CHAPTER III.

OF THE ONUS PROBANDI.

IN powers of this nature, a *series of acts*, preliminary in their character, are required by law to precede the execution of the power. Each and every step, from the listing of the land for taxation, to the consummation of the title by the delivery of a deed to the purchaser, is a separate and independent fact. All of these facts, from the beginning to the end of the proceeding, must exist; and if any material link in the chain of title be wanting, the whole falls to the ground for want of sufficient authority to support it.¹

The party claiming under the power, is chargeable with notice of every irregularity in the proceedings of the officers. He purchases at his peril, the maxim, "CAVEAT EMPTOR," being rigidly applied to him.² The reasons are obvious. The law imputes to *every* purchaser *knowledge* of all facts appearing at the time of his purchase, upon the muniments of

¹ *Blakeney v. Ferguson*, 3 English's Ark. R. 277; *Brown v. Veazie*, 25 Maine R. 362; *Doughty v. Hope*, 3 Denio R. 595; *Varick v. Tallman*, 2 Barbour S. C. R. 114-15; *Fitch v. Casey*, 2 G. Greene R. 300.

² *Lessee of Holt's Heirs v. Hemphill's Heirs*, 3 Hammond R. 232; S. C., 1-4 Cond. Ohio R. 551; *Dunning v. Smith*, 3 John. C. R. 344; *Stead's Executors v. Course*, 4 Cranch R. 408; S. C., 2 Pet. Cond. R. 151; *Yancy v. Hopkins*, 1 Munford R. 431; *Games v. Stiles*, 14 Peter R. 322; *Wright's* R. 53.

title, which it was necessary for him to inspect in order to ascertain the sufficiency of it.¹ More especially is this doctrine applicable to the purchaser at a tax sale. For knowing the land to have been sold under *color* of an authority given by law to a public officer, who is not the proprietor thereof, he is bound to inquire and take notice whether that officer, and all others whose agency is required by the law in the conduct of the proceedings, have proceeded with regularity in the discharge of their duty.² If the proceedings are not in conformity with the law, the fact is as well known to the purchaser as it was to the officer. The law, at least, presumes it to be so. The statute was not passed simply to inform the officer of his duty in the premises, and limit him as to the mode of executing the power, but it was also intended to give to the purchaser full information of the terms upon which a title could be acquired to land, sold at public vendue, for the non-payment of taxes in arrear upon it. It was meant to put bidders at a tax sale upon inquiry, whether or not the land was offered for sale according to law. If they do not examine, and buy against the plain and imperative provisions of the statute, they do so at their own risk; and it will be presumed against them that they knew that the deeds given under such circumstances, were made in violation of official duty and of the law.³ The purchaser claims his title under the authority of a public law, and is, therefore, bound to take notice of all its requirements; the authority of the officer is *special* and *limited*, the law

¹ *Battemore v. White*, 2 Gil. & John. R. 444.

² *Yancy v. Hopkins*, 1 Munford R. 431.

³ *Moore v. Brown*, 11 Howard U. S. R. 414.

is his warrant of attorney, and the buyer must see to it, that the terms prescribed by the legislature—the creator of the power—have been pursued by the agent. We have seen that the requisitions of this class of laws must be strictly pursued, and no purchaser is *blameless* who buys without seeing that they have been so.¹ “A special authority must be strictly pursued, and every purchaser is presumed to know *that* special authority in all cases where it is conferred and limited by statute.”² There is no great hardship in this. Experience and observation render it notorious, that the amount paid by purchasers at tax sales, is *uniformly trifling* in comparison with the value of the property sold. “*Acres for cents*,” is the maxim, and *cupidity* the ruling passion, of the speculators who attend tax sales.

Taxes ought to be paid, and that promptly. In the language of Judge Scates: “The government must have revenue, and it must be collected from all; it must be enforced from the unwilling and negligent by disposing of their property to those who are willing to advance the money.”³ But it must be remembered that *all* owners, whose names are perpetuated upon the “list,” are not wilfully or perversely “delinquent.” Oversight, accident and misfortune, the dishonesty of agents, the neglect of the guardians of infants, and the husbands of women owning separate estates, often interfere to prevent the seasonable payment of taxes. In such cases a sale takes place while the owner is unconscious of the wrong. Shall the innocent owner be protected

¹ *Allen v. Smith*, 1 Leigh R. 231.

² Chancellor Kent in *Dunning v. Smith*, 3 John. C. R. 344.

³ *Hinman v. Pope*, 1 Gilman R. 141.

under these circumstances? Reasonable judges will answer the question affirmatively. How protected? Not by an immunity from his duty to the government, but by requiring a rigid compliance with the prerequisites of the law. The object of the law is to raise a revenue with the least possible sacrifice to the citizen.¹ Every member of society is presumed to have assented to the public law by which his right of property is subjected to the dominion of strangers. The manner in which this power is to be exercised is specified in the law. The same law which creates or confers the power, bridles its execution. You may take my property to pay my debts, but you must ascertain that debt by judgment, and a sheriff must execute the power. You may take my land to build a railroad, but you must pay me the value of it. You may sell my land for taxes assessed upon it, but you must do it in the manner prescribed by the law. The citizen never assents to the power, unless the safeguards attached to its exercise are strictly observed. The delinquent, when his title is sought to be divested by a tax sale, has a right to say to the purchaser, "true, I have been negligent in the performance of my duty—a cause of forfeiture has thereby arisen—but the officer has been equally negligent; you also, in not inquiring into the regularity of the proceedings before purchasing; my title has not been *legally divested*, and I shall therefore insist upon my right according to the law of the land." To use the language of Chancellor Kent: "Sales of real property by public officers, of one description or another, have become so frequent, and have excited such *active cupidity*, and such a spirit of

¹ *Jackson v. Esty*, 7 Wendell R. 148.

speculation, that there is *very great danger* of injustice, unless we support strictly the checks and guards provided by law against abuse."¹ It is far better, when an irregularity occurs in the proceedings, that the purchaser should lose the inconsiderable amount of his bid, than that the owner should forfeit a valuable estate. The purchaser has his remedy. If the land was not subject to taxation, or the taxes had been paid before the sale, he must look to the State for that relief which such a case may require.² If the officers have failed in the performance of any duty enjoined upon them by law, they must respond in damages to the purchaser who has sustained an injury by their neglect.³ The purchaser's title is one of strict right. Positive law is the foundation of it. He deserves no *indulgence* from the courts. There should be no *leaning* in his favor. On the contrary, it is the duty of courts of justice to examine such sales narrowly, and if they do not appear to be strictly conformable to the law, to *pass the merited censure upon them*.⁴ In one case where the counsel, contesting the validity of a tax sale, raised many objections, the court in reviewing them, and after stating the degree of strictness which the law required in such cases, say: "The counsel for the defendant in this case may, therefore, be *excusable, if not commendable, for the astuteness and searching manner in which he has scrutinized the doings of these officers in the instance before us*."⁵

¹ *Dunning v. Smith*, 3 John. C. R. 344.

² *Jackson v. Moore*, 18 John. R. 442.

³ *Sumner v. Sherman*, 13 Vermont R. 613.

⁴ *Wilson v. Bell*, 7 Leigh R. 22; *Cox v. Grant*, 1 Yeates R. 164; Counsel for the Plaintiff arguendo in *Thames Manufacturing Company v. Lathrop*, 7 Conn. R. 550.

⁵ *Brown v. Veazie*, 25 Maine R. 362. In *McMillan v. Robbins*, 5 Ham. R.

Upon whom shall the burden of proof rest under such circumstances? Shall the purchaser at the tax

28, Judge Hitchcock says: "I am aware that it is common to complain of tax laws, and there is, perhaps, no part of legislation which is more difficult to perform satisfactorily, or in such a manner as to do equal and exact justice to all, than to frame a revenue system. We are aware, too, that courts have been *ASTUTE to find defects in tax sales*; so much so, that in this State at least, it has become the general, if not the universal opinion, that a title derived under such a sale cannot be supported. Whether courts have done wrong in this, it is not for us to say. The consequences, however, as members of the community, we cannot but regard. That it has a direct tendency to encourage those who dislike to pay a tax, in the neglect of the performance of this duty, there can be no doubt."

In the dissent of Judge Scates to the decision of the Supreme Court in *Hinman v. Pope*, 1 Gilman R. 141-2, he remarks: "The courts have adopted a rule of strict construction in these cases of naked powers, requiring a party to show a strict compliance with every prerequisite of law. This vigilance of the law upon naked powers, is a substitute for that vigilance which interest always prompts in those who execute a power coupled with an interest. But technical rules should have their limit subservient to the public good. The government must have revenue, and it must be collected from all; it must be enforced from the unwilling and negligent by disposing of their property to those who are willing to advance the money. But it will be impossible to do so if technical rules are applied to defeat their rights acquired under sales, upon all and every plausible pretext of error that ingenuity can, from time to time, suggest. The grounds of objection are made plausible in these cases, by the great disproportion between the consideration paid and the value of the property purchased. If the consideration was full and adequate, these objections would frequently wear the aspect of a dishonest resistance of right. If the public confidence is destroyed in ever acquiring a title free from technical objection, the State will be unable to collect her dues, as no one will advance where the blunders of ignorance and negligence in the executive officers, in not complying literally with the law, will be allowed to defeat their rights. Legislation can hardly keep pace with ingenuity, so as to remove, or anticipate the grounds of objection. *I should allow all SUBSTANTIAL departures from the law, as VALID OBJECTIONS.*"

In the case of *Atkins v. Hinman*, 2 Gilman R. 452-3, the late Chief Justice Treat, now Judge of the United States Court, in the Southern District of Illinois, after overruling various objections taken to a tax title, thus alludes to the subject of this digression: "In dismissing the various objections taken to these proceedings, I cannot forbear the remark that they are purely technical. The duty of every citizen to contribute, in proportion to the value of his estate, towards the support of the government which protects him in the enjoyment of his rights, must be acknowledged by all. The present revenue laws are liberal in their character; the rate of taxation is uniform and reasonable. The tax payer can readily ascertain the amount he is required to pay. He has several months in which to make payment, after his property is assessed. If he omit to pay, and his land is sold, he has still the right to redeem in two years from

sale, or those claiming under him, be required to establish *affirmatively*, that the officers acted strictly

the sale. If, after all this delay, he suffers his title to be transferred to the purchaser, the loss must be attributed to his gross disregard of his duties and interests, and not to the fault or injustice of the law. He should not, then, be permitted to defeat the title of the purchaser by interposing mere technical objections. If allowed to do it, he is enabled to take advantage of his own laches and wrong, not only to defeat the claim of the purchaser, but to avoid altogether the payment of his share of the public burden. Where all the material requisitions of the law have been substantially complied with, courts should not hesitate to sustain rights fairly acquired under them. It is time that the object and design of these enactments should be regarded. Judges should not be on the alert to discover frivolous objections, and resort to mere technical rules to sustain them, in order to defeat the claims of a purchaser. Such objections are generally insisted on, and have, in some instances, been countenanced by the courts. They proceed from a one-sided view of the subject. The allegation that the land is sacrificed for a trifle, and the purchaser is acquiring acres for cents, is alone regarded, while the obligations of the tax payer, and the rights of the government, are not considered. If the proceedings under these laws are to be subjected to mere technical tests, taxes will remain unpaid, individuals will cease to bid at sales, and thus the principal object of the laws may be frustrated. But if, on the other hand, by the application of reasonable rules, some assurance is given that the titles will be sustained, the taxes will be generally paid, the competition at the biddings will be increased, and instead of whole tracts of land being sold to pay the taxes due upon them, small portions only will suffice."

It may be proper to remark, in this connection, that the Illinois opinions above quoted, were upon the construction of a statute requiring a judgment and execution against the delinquent, which declared the deed to be conclusive evidence of several important facts, and *prima facie* evidence of all the rest; which allowed no one to contest the validity of a tax title, but the former owner and those claiming under him, and then only when it was shown that no other taxes were due upon the land; which permitted but four defenses to the tax deed, to wit: 1. That the taxes for which the land was sold, had been paid; 2. That the land was not subject to taxation; 3. That the land had never been listed and assessed for taxation; and 4. That the sale had been redeemed from; which dispensed with many technical objections which, under the former laws, were regarded as substantial; which provided for an actual, fair and uniform valuation by sworn assessors; and which was liberal in granting the privilege of redemption. Again, the greater part of the lands in the State were then in the hands of non-residents, who either perversely refused to pay taxes—the land not being very valuable—or whose agents were not trustworthy; and the government really labored under great difficulties in enforcing the collection of her revenues. But a change has taken place in the condition of Illinois, and indeed, of all the western States. Railroads traverse the length and breadth of the State; the lands have become valuable; they are either in the hands of actual settlers, or those who are holding them for speculation; the taxes are more promptly paid; the delinquent list in each county of the State, instead of

in conformity with the law? or shall the owner of the land, whose title is sought to be divested, be compelled to prove a *negative*? It is a general principle, that the party who sets up a title, must furnish the evidence to support it. If the validity of a deed depend upon an act *in pais*, the party claiming under that deed is as much bound to prove the performance of that act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain, which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title.¹

It is easy for the purchaser to prove these facts. In many cases the negative would not admit of proof.

The existence of these acts *in pais*, is not to be made out by intendment, they must be proved. It is not a case for presuming that public officers have performed their duty; but what they have in fact done must be shown. By the common law, which views every invasion of the sanctity of property

requiring an entire newspaper for its publication, has dwindled down until it can be compressed into a single column; indeed, it may be safely affirmed that the majority of delinquents are now prevented by fraud, accident or mistake, from paying their taxes promptly. Hence the *laxity of strictness* adopted by the courts in early days, on account of the necessities of the government, and the hostility of the settlers to non-resident proprietors—for decisions necessarily partake of the temper of the times in which they are made—is no longer demanded. It is now safer and wiser, and more in accordance with the spirit of the age, to return to those strict and unbending principles of law which were intended for the security of *private property*, and which the older States know so well how to appreciate.

¹ *Williams v. Peyton's Lessee*, 4 Whea. R. 77; S. C., 4 Pet. Cond. R. 394; *Pope et. al. v. Headen*, 5 Ala. R. 433; *Jackson v. Esty*, 7 Wendell R. 148; *Brown v. Wright*, 17 Vermont R. 97.

with peculiar jealousy, an authority to divest the title of another is to be strictly pursued, and as the maxim, "*omnia rite presumuntur*," is appropriate but to judicial proceedings, no intendment in respect to the exercise of it, is to be made in favor of what does not appear; so that every act the performance of which is made a condition of the *divestiture*, must be shown by proof. Presumptions are never made for the purpose of upholding the acts of a special agent, whether appointed for public or private purposes; nor can such a presumption be made in favor of a ministerial officer, where recourse *can be had to the authority* under which he acted, and to the thing itself that is done under it; for that would be to substitute *confidence* in the officer, for the due performance of his duty.¹ Indeed, it is said by one judge, that "*very few of these sales have been found to be legal; the presumption is, in fact, against their validity.*"² Presumptions are seldom founded upon state necessity or public policy. They are the result of the *general experience* of a connection between certain facts or things; the one being *usually* found to be the companion, or the effect of the other. The connection, however, is not so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; *but yet so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the*

¹ *Huston v. Foster*, 1 Watts R. 478; *Hole v. Rittenhouse*, 18 Pa. State R. 305; *Hall v. Collins*, 4 Vermont R. 316; *Kinney v. Beverly*, 2 Hen. & Munf. R. 341; *Waldron v. Tuttle*, 3 N. H. R. 340; S. C., 4 Ibid. 371; *Fitch v. Casey*, 2 G. Greene, (Iowa,) R. 300; *Jesse v. Preston*, 5 Grattan R. 120; *Altord v. Collins*, 20 Pick. R. 418; *Minor v. Natchez*, 4 S. & M. R. 627; *Pitman v. Brownlee*, 2 A. K. Mar. R. 210.

² *Waldron v. Tuttle*, 3 N. H. R. 340.

other, in the absence of all opposing evidence. Such is the rule relative to *disputable presumptions*,¹ the only class which it is pretended should be indulged in for the purpose of maintaining the validity of a tax title. When it is remembered that out of, at least, one thousand causes of this description, which have found their way into the appellate courts of the country, not twenty of them have been found to be legal and regular, on applying the test; and that, if this is a fair criterion of the result of the numerous *nisi prius* trials which have taken place throughout the land, we may safely affirm that tax titles have not been found to be so "*generally, and nearly universally*" valid, as to authorize the courts to presume them so in all cases. There are a class of decisions, however, which lay down the rule in support of a long possession under a tax deed, that upon the production of the deed, proof of the possession under it, and of the performance of some of the acts required by law of the officers, the evidence may be submitted to a jury, with instructions that if upon the whole case, they are satisfied that it is a reasonable presumption that all of the facts existed which authorized the sale, they might and should so find. These decisions will be examined at large in the chapter entitled "Evidence."

The *recitals* in a tax deed are not evidence against the owner of the property, but the facts recited must be established by proof *aliunde*,² nor is the conveyance itself, because of its solemnity, or upon any

¹ 1 Greenl. Ev. Sec. 33.

² *Keith v. Preston*, 5 Grattan R. 120; *Jackson v. Esty*, 7 Wendell R. 148; *Jackson v. Shephard*, 7 Cowen R. 88; *Hall v. Collins*, 4 Vermont R. 316; *Brown v. Wright*, 17 Ibid. 97; *Mussey v. White*, 3 Greenleaf R. 302; *Smith v. Corcoran*, 7 Louisiana R. 46.

conceivable principle, *prima facie* evidence that the prerequisites of the law had been complied with by the various officers of the law, who conducted the proceedings.¹ The fact that they were regular must be proved, and the ONUS PROBANDI rests, in all cases, upon the purchaser, or those claiming under him. He must show affirmatively, *step by step*, that everything has been done which the statute makes essential to the due execution of the power conferred upon the officers.²

The rule that the *onus* is upon those who claim under a tax sale, is confined to controversies between

¹ *Nalle v. Fenwick*, 4 Randolph R. 585; *Nancarrow v. Weathersbee*, 6 Martin's Lou. R. 347; *Christy v. Minor*, 4 Munf. R. 431; *Holt v. Hemphill*, 3 Ham. R. 332; *Thompson v. Gotham*, 9 Ibid. 170; *Latimer v. Lovett*, 2 Doug. Mich. R. 204; *Emery v. Harrison*, 13 Pa. State R. 317; *Westcott v. McDonald*, 22 Maine R. 402; *Lessee of Dunn v. Games et. al.*, 1 McLean R. 319. In Kentucky, a tax deed is held *prima facie* evidence of title, and the *onus* lies upon the former owner to show irregularity in the sale. *Curry v. Fowler*, 5 J. J. Mar. R. 145; *Blight v. Banks*, 6 Munroe R. 206; *Oldham v. Jones*, 5 B. Monroe R. 458; *Bodley v. Hoard*, 2 A. K. Marshall R. 244; *Allen v. Robertson*, 3 Bibb. R. 326.

² *Jackson v. Shephard*, 9 Cowen R. 88; *Lafferty v. Byers*, 5 Hammond R. 457; *Dresback v. McArthur*, 6 and 7 Ohio R. 307; *Scott v. Detroit Young Men's Society*, 1 Doug. Mich. R. 119; *Latimer v. Lovett*, 2 Ibid. 204; *O'Brien v. Coulter*, 2 Blackf. R. 421; *Love v. Gates*, 4 Dev. & Bat. R. 363; *Pope v. Headen*, 5 Ala. R. 433; *Watson v. Stucker*, 5 Dana R. 581; *Terry v. Bleight*, 3 Munroe R. 270; *Bishop v. Lovan*, 4 B. Mon. R. 116; *Allen v. Smith*, 1 Leigh R. 231; *Chapman v. Bennett*, 2 Ibid. 329; *Jesse v. Preston and Keith v. Preston*, 5 Grattan 205; *Matthews v. Light*, 32 Maine R. 305; *Waldron v. Tuttle*, 3 N. H. R. 340; *Lessee of Dunn v. Games et. al.* 1 McLean R. 319; *Minor v. McLean*, 4 McLean R. 138; *Mayhew v. Davis*, Ibid. 213; *Jackson v. Esty*, 7 Wend. R. 148; *Beekman v. Brigham*, 1 Selden R. 366; *Hall v. Collins*, 4 Vermont R. 316; *Richardson v. Dorr*, 5 Ibid. 9; *Bellows v. Elliott*, 12 Ibid. 569; *Brown v. Wright*, 17 Ibid. 97; *Frost v. Ross*, 1 Watts & Serg. R. 501; *Dikeman v. Parrish*, 6 Barr R. 210; *Morris v. Crocker*, 4 Lou. R. 147; *Reeves v. Toules*, 10 Ibid. 276; *Baker v. Toules*, 11 Ibid. 432; *Emery v. Harrison*, 13 Pa. State R. 317; *Alvord v. Collins*, 20 Pick. R. 418; *Howe v. Russell*, 36 Maine R. 115; *Stevens v. McNamara*, 36 Maine R. 176; *Stead's Executors v. Course*, 4 Cranch R. 403; *S. C.*, 2 Pet. Cond. R. 151; *Williams v. Peyton*, 4 Whea. R. 77; *Ronkendorff v. Taylor*, 4 Pet. R. 349; *Games v. Stiles*, 14 Pet. R. 322; *Early v. Doe*, 16 Howard U. S. R. 610; *Lyon v. Burt*, 11 Ala. R. 295; *Garrett v. Wiggins*, 1 Scam. R. 335; *Hill v. Leonard*, 4 Ibid. 140; *Fitch v. Pinckard*, Ibid. 69; *Hinman v. Pope*, 1 Gilman R. 131; *Irving v. Brownell*, 11 Illinois R. 402.

the owner of the tax title and the original owner of the land, or those who claim under him, and is never applied in favor of an intruder upon the land, or a mere trespasser who cuts timber, or does any other injury to the inheritance.¹ It has also been held that where the purchaser seeks to rescind his contract of purchase, and recover back the amount of his bid from the tax collector, the burden of proof is cast upon him to prove that the *sale was void*, and he could acquire no title to the land under it.² Where a vendee files a bill to rescind a contract for the purchase of land lying in another State, upon the allegation that the land is incumbered by a tax sale, the *onus* lies upon him to prove that the law under which the sale took place, was strictly complied with.³ The principle which casts the *onus probandi* upon the party claiming under a tax title, is applied to all other cases. The rule of the common law is, that he who affirms the existence of a material fact, must prove it, and the opposite party is seldom, if ever, required to prove a negative.⁴ Where a party sets up title to land under a sheriff's sale, it is incumbent on him to show a judgment rendered by a court of competent jurisdiction, and a valid execution issued thereon, as well as to produce the sheriff's deed; for it is only in satisfaction of judgments that the law, subjecting land to the payment of debts, authorizes them to be sold. The sheriff derives his authority to sell from the

¹ *Bellows v. Elliot*, 12 Vermont R. 569; *Huston v. Foster*, 1 Watts R. 478; *Foster v. McDivit*, 9 Watts R. 341; *Foust v. Ross*, 1 Watts & Serg. R. 501; *Dikeman v. Parrish*, 6 Barr R. 210; *Dejarnett v. Haynes*, 23 Miss. R. 600; *Smith v. Bodfish*, 27 Maine R. 289; *Robinett v. Preston*, 4 Grattan R. 141.

² *Treat v. Orono*, 26 Maine R. 217.

³ *Watson v. Stucker*, 5 Dana R. 581.

⁴ *Hinman v. Pope*, 1 Gilman R. 131; *Dranguet v. Prudhomme*, 3 Lou. R. 83; *Costigan v. Mohawk & Hudson R. Co.*, 2 Denio R. 609.

judgment and execution, and not by reason of any interest he has in the property. Not to require the production of the judgment, is to say that a man's estate may be divested without the judgment of his peers or the law of the land. It is a principle of natural justice never to be lost sight of, that no person should be deprived of his property or other rights, without notice and an opportunity of defending them. Not to require the execution to be produced, is equivalent to deciding that the judgment *per se* divests the title of the owner. Such is not the law. The protection of property against rapacity and fraud would be slight indeed, under the operation of such a principle. To afford this very protection the rule of law was established, that the existence of the execution, and the judgment upon which it rests, are matters to be proved affirmatively by the claimant under a sheriff's deed, by evidence *aliunde*. The judgment is the foundation of his right to subject the land to the payment of his debt, and the execution constitutes the authority of the sheriff to sell. When he commences his action he assumes the affirmative that a judgment has been rendered, and an execution issued upon it, and the records and files of the court furnish him with plenary evidence to sustain his title, if he has one.¹ So a person claiming under a decree in chancery, must

¹ *Hamilton v. Adams*, 2 Murphy R. 162; *Jackson v. Roberts*, 11 Wend. R. 425, 433, 440; *Natchez v. Minor*, 4 S. & M. R. 602, 627, 631; S. C., 10 Ibid. 246; *Smith v. Moreman*, 1 Munroe R. 154; *Dunn v. Merriweather*, 1 A. K. Mar. R. 158; *Terry v. Bleight*, 3 Munroe R. 270; *Stevens v. Robertson*, Ibid. 97; *Weyand v. Tipton*, 5 S. & R. R. 332; *Bowen v. Bell*, 20 John. R. 338; *Hinman v. Pope*, 1 Gil. R. 131; *Smith v. State*, 13 S. & M. R. 140; *Dafour v. Camfranc*, 11 Martin Louis. R. 607; *Wheaton v. Sexton*, 4 Whea. R. 503; *Ware v. Bradford*, 2 Ala. R. 676; *McEntyre v. Durham*, 7 Iredell R. 151.

produce the decree, in order to establish his title.¹ Where an heir claims title in ejectment, he must prove his pedigree, as well as the seizin of his ancestors, before he can recover.² Where one claims title under a power of attorney, he must produce and prove the warrant, as well as the deed executed under it; and where a party deduces title under any special authority, the common law requires him to establish the fact that the terms of the power have been complied with. It may be said generally, that in order to sustain a conveyance executed by an attorney under a power, by an executor under a will, by a sheriff under an execution, by a guardian or administrator under an order of court, by a master or commissioner under a decree of a court of chancery, the power of attorney, the will, the judgment and execution, the order or decree must be produced.³ Indeed, *all essential links in every chain of title, whether they are evidenced by records or deeds, or rest merely in parol, must be affirmatively proved by the party who sets up the title.* The rule imposed upon the tax purchaser is, therefore, no departure from the general principles of jurisprudence. It matters not that it may be *difficult* for the purchaser to comply with such a rule; it is his business to collect and preserve all of the facts and muniments upon which the validity of his title depends. "The very nature of such titles, it seems to me, ought to warn the purchasers to see that all of the prerequisites of the law are complied with *ad unguem* (to a nicety). They often buy large and valuable tracts of land for a mere trifle, and they ought

¹ *Bledsoe v. Doe*, 4 Howard Miss. R. 13; *Lyerly v. Wheeler*, 11 Iredell R. 288; *Williamson v. Bradford*, 10 Ibid. 198.

² Tillinghast's *Adams on Eject.*, 281-2, fourth edition, 1854.

³ *Jackson v. Roberts*, 11 Wend. R. 425; *Tolman v. Emerson*, 4 Pick. R. 160.

always to expect that the owner will attempt to recover them. This is notice, intrinsic in the transaction, that they must be ready for defense, and they ought, at once, to collect the proper evidences of compliance with the law; these documents, being written or printed, can be just as easily preserved as their deed." No purchaser is *blameless*, who fails to preserve evidence so essential to the validity of his title.¹ The evidence upon which he is compelled to rely is usually preserved upon the records and among the files of some public office, and these records and files are always accessible to him. If there is any fact which the officers have neglected to insert in their records or returns, and the purchaser apprehends the death of his witnesses, the law has provided ample means by which he can perpetuate any fact, *in pais*, material to the validity of his title.² If the officers charged with the duty, fail to return or record the proceedings, if the records and files become lost or destroyed, or the witnesses to the facts die, the purchaser has no just cause of complaint against the law; he stands in the same predicament with all other suitors in courts of justice, who have a clear right, but no evidence to support and establish it. Suppose the burden of proof reversed, and the owner of the land required to prove the negative, in the case put of a neglect of the officers to return or record their proceedings, or of the loss or destruction of the records and files, he would occupy the same hard position in which the law now places the purchaser.

Titles acquired under tax sales, depend upon dif-

¹ *Allen v. Smith*, 1 Leigh R. 231; *Williams v. Peyton's Lessee*, 4 Whea. R. 77; *Varick v. Tallman*, 2 Barbour S. C. R. 114-15.

² *Reeds v. Morton*, 6 Missouri R. 77-8.

ferent principles from those which are derived under government grants. The laws for the sale of the public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to preserve the State from imposition. Officers are appointed to superintend the business, and rules are framed prescribing their duty. These rules are, in general, *directory*, and when all the proceedings are completed by a patent, issued by the authority of the State, a compliance with these rules is presupposed. That every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself. It would, therefore, be extremely unreasonable to avoid a grant, in any court, for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent. Besides, the government is an independent source of title, and grants her own lands. The patent is a title of record, and issues under the great seal of State. It is, therefore, properly held that the patent is the completion of the title, and establishes the performance of every prerequisite. However, the party claiming the land adversely to the patent, may defeat the grant at law, by showing that the government had no title to the land granted, or that the officer had no authority to make the grant; or he may avoid it in chancery, by establishing fraud in the issuing of the patent, or showing an elder equity to the land in himself.¹ The

¹ 9 Cranch R. 87; 5 Whea. R. 293; 7 Whea. R. 122; 3 Pet. R. 320 and 340; 11 Whea. R. 380; 2 Pet. R. 227; 7 Pet. R. 222; 10 Pet. R. 662; 4 Cranch R. 421; 5 Cranch R. 191; 6 Cranch R. 148; 9 Ibid. 164; 7 Whea. R. 248; 6 Pet. R. 328; 13 Ibid. 436; 14 Ibid. 448; 15 Ibid. 93; 2 Howard U. S. R. 284.

case is different with tax titles. The title is a derivative one. The government acts, by its agents, in hostility to and with a view of subverting the title of the true owner. The agent acts under a special authority. The title is not deducible of record, but depends upon a variety of acts *in pais*, the performance of which are essential to the passing of the title of the rightful proprietor. For these reasons a tax deed cannot be read in evidence without proof of its execution, and that all of the requirements of the law have been strictly complied with by the agents of the government.¹ Thus much for the common law, which devolves upon the party claiming under the tax sale the burden of proving, that in all essentials, the officers have performed the duty enjoined upon them by the law under which the proceeding took place. It is now proposed to show *how far* this rule has been changed by legislative enactment in the several States. That the legislature possesses competent power to change the common law rules of evidence, and declare that the tax deed itself shall be received in all courts as *prima facie* evidence that all of the prerequisites of the law have been complied with, and thus shift the *onus probandi* from the shoulders of the purchaser to those of the owner, is conceded.² But that the legislature have the further power to declare the deed *conclusive evidence of title*, is denied. A. is the owner, and in possession of a

¹ *Boardman v. Lessee of Ford et. al.*, 6 Pet. R. 342; *Varick v. Tallman*, 2 Barbour S. C. R. 115-16; *Hulick v. Scovil*, 4 Gilm. R. 173-5. The Supreme Court of Illinois had previously held that the registry law did not apply to a tax deed, because it was a patent. *Graves v. Bruen*, 1 Gilm. R. 172.

² *Pillow v. Roberts*, 13 Howard U. S. R. 472; *Garrett v. Wiggins*, 1 Scam. R. 335; *Steadman v. Planters' Bank*, 2 Eng. Ark. R. 424-8; *Reed v. Morton*, 6 Miss. R. 74; *Dejarnett v. Haynes*, 23 Miss. R. 600—in this case the right is doubted; *Bussey v. Leavitt*, 3 Fairfield R. 378.

tract of land worth two thousand dollars. It is sold at a tax sale, and B. becomes the purchaser, for five dollars; he procures his deed, and brings his action of ejectment against A. The defendant relies upon one of three defenses, which ordinarily are conceded to be valid: 1. That the land was not subject to taxation; or, 2. That it was never listed, valued and assessed; or, 3. That the defendant paid the taxes before the sale. Here the legislature step in and deprive him of his defense, by declaring that the tax deed shall *conclude* him upon all of these points. Is such a law valid? Is it true that the legislature possesses such an arbitrary authority? Is it true that the law-making power, under the pretense of regulating remedies, can violate the obligation of contracts, and divest the estate of the citizen? May the legislature do that indirectly, which they are forbidden to do by direct means? Can it, under the guise of taxation, or the appropriation of private property to public uses, take the land of A. and give it to B.? To render the law in question valid, these inquiries must be answered affirmatively.

The taxing power extends to the levy and collection of the tax. Taxable property only is embraced by it, and the power to collect cannot be extended so as to reach and divest the property of one who has paid his tax promptly. It never was intended that a party who had performed all of his duties to the public, should be deprived of his property in this way. The power of taxation, so far as it relates to the *collection* of taxes, was designed to operate upon those only who should willfully or negligently omit the payment of taxes to which they might be subject, and which should be legally assessed upon their es-

tates, and not upon those who should promptly perform all of their constitutional obligations. The obligation is reciprocal; if the citizen performs his duties to the government, that government should perform its duties to the citizen. *Among the first of these*, is protection in his property—not only from private force, cupidity and fraud, but from governmental plunder—and it should not be taken by the State, or its agents, without any fault or omission of duty on his part. If the land was not liable to taxation by reason of an exemption, if no taxes had been assessed upon it, or if the taxes had been paid, the power of sale never attached to it. To hold that the owner, under such circumstances, is precluded from showing the fact, would be a “*monstrous doctrine*.”¹ Judge Caton, in *Curry v. Hinman*,² in construing a statute which, according to the reading of it by the counsel for the tax purchaser, deprived the former owner of the right to prove that he had paid the taxes for which his land was sold, says: “It would be nothing less, at least, than a *moral fraud*, to close the door against all defense to a *void title*, without any fault or negligence on the part of the owner. If he pays his taxes within the time prescribed by law, he is as blameless as if he had paid them the instant they became due. To say nothing of the power of the legislature thus, in effect, to divest an innocent man of his property and give it to another, the *monstrous injustice* of such a law is too glaring to admit of that construction, if one more just and reasonable can be given to it.” Again: “We should be very loth to say that the legislature intended to

¹ *Rowland v. Doty et. al.*, 1 Harrington Ch. R. 3-11; *Jackson v. Morse*, 18 John. R. 441.

² 11 Ill. R. 428-9.

create a permanent disability, which the party, by no possibility, could remove. That would be doing indirectly, what they could not do directly. To debar an innocent party altogether of the privilege to prosecute or defend a right in the courts of justice, is equivalent to taking the right from him altogether. The latter they cannot constitutionally do; the former we will not presume they intended to do." Where the State has no power to sell the land for taxes by reason of the facts suggested, and yet do so, convey to another citizen, and declare that his deed shall be conclusive evidence of a fee simple title, it is, to all intents and purposes, the taking of the land from A., the former owner, and giving it to B., the pretended purchaser. This, as Judge Caton remarks, "*the legislature cannot constitutionally do.*"¹ This is not the *lex terræ* meant by the Constitution.¹

Whatever may be the decision upon the question of power when it properly arises, the moral injustice and impolicy of such legislation, cannot be denied; and it will be seen upon an examination of the authorities, that when such arbitrary power has been exercised by the legislature, the courts have given a *strict construction* to the law, and not extended its unjust operation beyond the *very words of the statute*.² By the Act of February 19, 1827, the Illinois Legislature declared that the deed should "*vest a perfect title in the purchaser unless the land shall be redeemed according to law, or the former owner shall show that the taxes for which it was sold, had been*

¹ 9 Geo. R. 354; 16 Mass. R. 330; 5 Paige R. 146-160; 2 Kent's Commen. 340; 2 Pet. R. 653; 3 Yerger R. 41; 11 Wend. R. 149-151; 19 Wend. R. 659; 5 Barbour S. C. R. 483; 18 Wend. R. 56-57; 4 Hill R. 140; 1 Bay R. 252; 4 Barbour S. C. R. 71-75; 2 C. Greene, Iowa, R. 26-7; 2 Yerger R. 606.

² *Houlton v. Blaisdell*, 24 Maine R. 283.

actually paid according to law, or that the land was not legally subject to taxation." In *Garrett v. Wiggins*,¹ the Supreme Court of that State, in giving a construction to this statute, state the rule of the common law as to the burden of proof, and the strictness required in this class of cases, concede the power of the legislature to alter these rules, admit that it has done so to some extent in this very instance, that under this statute several preliminary facts to a legal sale by the auditor, are to be inferred by his conveyance, and the responsibility of proof shifted from the purchaser to the original owner, but the court deny that this statute will, "by any fair construction, warrant the opinion that the auditor, selling land *without authority*, could, by his conveyance, transfer the title of the rightful owner." They say that to consummate his authority, the law imperatively requires him to publish notice of the time and place of sale, that the publication of this notice is not one of those facts which can be inferred from his conveyance, and that without proof of this fact, the auditor's deed is not evidence of the regularity and legality of the sale, and consequently conveyed no title to the purchaser. The Michigan Statute of April 13, 1827, declares that the tax deed shall vest in the purchaser "*an absolute estate in fee simple*," &c., and be "*conclusive evidence that the sale was regular according to the provisions of this act*." On the construction of this statute the Supreme Court of that State have twice held that the tax deed was only *conclusive evidence* that the sale itself was made, at the time and place, and was conducted by the person and in the manner prescribed by law; but that it

¹ 1 Scammon R. 335.

was still inadmissible in evidence, unless *accompanied* by proof that the taxes had been legally assessed and returned, and that *all* of the proceedings *anterior to the sale*, had been in strict conformity with the requirements of the statute.¹ One of the New York statutes declares that the comptroller's deed shall be "*conclusive evidence of the regularity of the sale*;" but the courts of that State hold this relates solely to the *auction and notice of sale*, and does not dispense with proof of the other prerequisites of the law; in other words, the deed is evidence of the *regularity* of the comptroller's *sale*, but not of *his power to sell*.² Another statute of that State declared that the deed "*shall vest in the grantee an absolute estate in fee simple*." These words were held to be merely descriptive of the estate which the purchaser would acquire under the statute, where the authority of the officer to sell has been established by proof, that all the requirements of that statute had been fully complied with.³ The Tennessee statute of 1844, declared a deed made in pursuance of a "*public sale for taxes*," *prima facie* evidence of the prerequisites of the law. A party claimed under a town corporation tax sale. The Supreme Court of that State held that a corporation tax deed was not within the law. Judge Turley says: "Corporation taxes are not *public*, but *private* taxes, and are, therefore, not embraced within the provisions of the act of 1844; but are left, as to

¹ *Scott v. Detroit Young Men's Society*, 1 Doug. Mich. R. 121; *Latimer v. Lovett*, 2 Ibid. 204; *Rowland v. Doty*, 1 Harrington C. R. 3.

² *Doughty v. Hope*, 3 Denio R. 595; *Tallman v. White*, 2 Comst. R. 69; *Striker v. Kelly*, 2 Denio R. 329-331; *Varick v. Tallman*, 2 Barbour S. C. R. 117-118; *Beekman v. Brigham*, 1 Selden R. 366.

³ *Jackson v. Morse*, 18 John. R. 441; *Tallman v. White*, 2 Comst. R. 69; *Varick v. Tallman*, 2 Barbour S. C. R. 118-119; *Rowland v. Doty*, 1 Harrington C. R. 3.

the remedy for collection, as it existed prior to the passage of the statute, and in case of a sale of real estate for effectuating that purpose, subject to all of the rigid strictness of construction which existed in the cases of sales for the collection of state and county revenue, previous to its passage."¹ The Indiana statute of 1824, provides that the collector's deed "shall be *prima facie* evidence of the regularity of the sale;" and the Supreme Court of that State decided, in construing this statute, that the deed furnished no evidence that the tax had been legally assessed, or that it had not been duly paid, or that the land was not exempt from taxation, but that the deed was *prima facie* evidence of the regularity of the proceedings, so far as the acts of the collector are concerned, and not of the precedent acts necessary to clothe him with authority to sell.² The Illinois act of February 26, 1839, prescribed the form of the collector's deed, and declared that "deeds, as executed by the collector *as aforesaid*, shall be *prima facie* evidence," 1. That the land was subject to taxation; 2. That it had been listed and assessed in the time and manner required by law; 3. That the taxes were unpaid; and 4. That no redemption had taken place. "*And shall be conclusive evidence*," 1. That the land was advertised in the manner, and for the length of time required by law; 2. That the land was sold for taxes as stated in the deed; 3. That the grantee in the deed was the purchaser; and 4. That the sale was conducted in the manner required by law. The same statute required the collector to demand the

¹ *Shoalwater v. Armstrong*, 9 Humph. R. 217.

² *Parker v. Smith*, 4 Blackf. R. 70; *Doe v. Himelick*, Ibid. 71, Note; S. C., Ibid. 494.

tax of the owner, if not paid, to seize his goods and chattels, and sell the same for the non-payment of the tax. If no goods and chattels could be found, the collector was required to report the delinquents to the Circuit Court, and demand a judgment against their lands, giving previous notice, by publication in a newspaper, of the time and place of making such application. The Court were directed to enter judgment upon such application, and the law then required the clerk, within five days after the adjournment of the court, to issue a precept to the sheriff or collector, under the seal of the court, which should consist of the collector's report, and the order of the court thereon, which the law declared, "shall hereafter constitute the *process* on which all lands shall be sold for taxes." The Supreme Court of Illinois, in the case of *Hinman v. Pope*,¹ decide in construing this statute, that a party claiming title under a sale for taxes, must produce a judgment rendered by a court of competent jurisdiction, and a valid precept to the collector, before he can read his deed in evidence; that the deed is not evidence of these facts, because the law has not so declared. A decision will now be noticed in conflict with these authorities, and unsupported by any fair rule of construction. It is the case of *Rhinehart v. Schuyler*,² which was an action of ejectment by the defendant in error, claiming title under an auditor's deed, bearing date November 8, 1833, and purporting to be made in pursuance of a sale for taxes, under the revenue law of Illinois, approved January 19, 1829, which provided "That it shall not be *necessary* for any purchaser of lands so sold for taxes, to obtain,

¹ 1 Gilm. R. 131.² 2 Gilm. R. 473.

keep, or produce any advertisement of the sale thereof, BUT his deed from the auditor of public accounts shall be evidence of the regularity and legality of the sale, until the contrary shall be made to appear." The court held that the deed was *prima facie* evidence that all of the prerequisites of the law had been complied with by the auditor. The only reason assigned for this judgment is, that the language of the law "is so plain and palpable, that he who runs may read and understand it." With due respect to the judge who drafted this opinion, there are several reasons why the profession in other States cannot regard it as a precedent. It is directly opposed to the New York, Michigan, Indiana and Tennessee cases above cited; it is in conflict with the spirit of the decisions of the Supreme Court of Illinois in the cases of *Garrett v. Wiggins* and *Hinman v. Pope*; it is repugnant to the principle fairly deducible from all of the decisions herein-before referred to, inasmuch as they all proceed upon the ground, that the common law rule must be adhered to, except so far as the *very words* of the statute may have changed it; and this upon the principle that all statutes in derogation of the common law, must be *strictly construed*. The court, in that case, instead of adhering to this maxim, extend, by *implication*, the words of the legislature beyond the case actually provided for. The provision is, that the deed shall be evidence of the "regularity and legality of the sale," and not of the authority to sell—both of which are necessary to its validity. A sheriff's deed is evidence of the *regularity of the sale*, and yet the courts invariably require the purchaser to show a judgment and execution. For what purpose? To establish the authority of the

sheriff to sell. So in this case, the deed is evidence of the *regularity of the sale*, but the tax purchaser must also establish the authority of the auditor to sell, by proving those facts, without which it has no existence. The grammatical construction of the whole provision sustains this course of reasoning. "It shall not be necessary for the purchaser to produce the advertisement of the sale, *but* his deed shall be evidence of the regularity of the sale." It does not dispense with proof of the listing and valuation of the land, and the assessment of the tax, but merely with the production of the advertisement. It is by construction that the clause can even be extended to the *time, place and manner* of sale, and the *person by whom* it is made. The Ohio act of March 2, 1846, Section 4, provides that where any lands have been, or shall thereafter be sold for taxes, the purchaser may recover possession by action of *forcible entry and detainer*, and that the evidence of the title of the purchaser, &c., shall not be set aside, or impeached by evidence of any irregularity or informality in levying the tax, or in any of the proceedings previous to such sale. The Supreme Court of that State, in deciding upon the validity of a tax title, in an action of *ejectment*, refused to be controlled by the statute, saying: "This particular section of the statute has reference to proceedings in forcible *entry and detainer*, and there is nothing in it which requires that its principles should be extended to other cases. This is not a proceeding of that kind, and of course this statute has nothing to do with it."¹ Another statute of that State prescribed *the form* of the auditor's deed, and declared that *such deeds* should be

¹ *Hammel v. Smith*, 15 Ohio R. 134.

received in all courts as *prima facie* evidence of a good and valid title to the purchaser. In *Carlisle v. Longworth*,¹ the form prescribed by the legislature had not been followed by the auditor, and the court held that only such deeds as were executed in the *form and manner* prescribed, were entitled to this *legislative immunity* from the rigor of the common law. In the case of *The People v. The Mayor, &c.*,² the facts were that a law of New York, instead of selling the fee, directed the sale of a leasehold interest in the land, and declared that the lease "should be *conclusive evidence of the regularity of all the proceedings, &c.*" The relator had purchased at one of these sales, and the time of redemption had expired. He applied for his lease, which was refused, the law not having been complied with. He thereupon moved the court for a mandamus against the officer, which was denied, the court saying: "Should we *compel* the execution of the lease, the purchaser's title might be *protected*, [referring, of course, to the section of the law which made the lease conclusive evidence of title in the purchaser,] *but we are not inclined to exert this high power of the court to give strength and validity to a title which appears clearly defective on the merits, and which without this statutory support, cannot be sustained.*" Thus the current of authorities runs strongly in favor of the reasonable principles of the common law, and wherever an innovation has been made by statute upon those principles, the courts have discountenanced them, so far, at least, as to confine the operation of the statute within the bounds prescribed by its words. They give effect to the intent of the legislature, as manifested by the language used, disre-

¹ 5 Ohio R. 229.² 10 Wend. R. 398.

garding the spirit of the rule prescribed, by refusing, in every instance, to give an equitable construction to the statute. This strictness is commendable, and sustained by reason and authority in analogous cases. There are two cases yet to be noticed, before leaving this subject. The Ohio act of January, 29, 1827, declares that the tax deed "*shall convey to the purchaser, &c., a good and valid title to the land so sold, and shall be received in all courts in this State, as good evidence of title, &c., nor shall the title conveyed by said deed, be invalidated or affected by any ERROR previously made in listing, taxing, selling or conveying said land.*" In *Gwynne v. Neiswanger*,¹ it was held by the Supreme Court of that State, that under this statute the deed raised a *conclusive presumption* that all of the proceedings *anterior* to its execution and delivery, were in strict conformity with the requirements of the statute. The Arkansas statute of 1838, provides that the "auditor's deed shall vest in the purchaser *all the right, title, interest and estate of the former owner* in and to such land, and also all the right, title, interest and claim of the State thereto; and shall be *evidence* in all courts of this State, of a good and valid title in such grantee, his heirs and assigns, and that all things required by law to make a good and valid sale, were done both by the collector and auditor." In the case of *Steadman v. Planters' Bank*,² which was an ejectment to recover land sold under this statute for the non-payment of taxes, the plaintiff offered his tax deed in evidence. The Circuit Court excluded it upon the ground that the deed was *not evidence of any fact not recited in it*. On error, the Supreme Court reversed the judgment of the

¹ 18 Ohio R. 400.² 2 English R. 424-8.

Circuit Court, holding that the statute under which the deed was executed, changed the common law, and made the deed conclusive evidence of the regularity of all the proceedings of the collector and auditor. The New York statute of April 10, 1850, declares that the tax deed "shall be *presumptive* evidence that the *sale*, and *all proceedings prior thereto*, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, *were regular* according to the provisions of this act, and all laws directing or requiring the same, or in any manner relating thereto."

CHAPTER IV.

OF THE ELECTION AND QUALIFICATION OF THE SEVERAL
OFFICERS WHO HAVE ANYTHING TO DO WITH THE EXE-
CUTION OF THE POWER.

It is a general principle of law, that whenever a right is claimed under the proceedings of one who purports to have acted in an official capacity, the fact that he who did the act upon which the right is based, *was a public officer*, must appear. This is especially applicable to a case where a title to real estate is to be divested under the authority of a statute, and through the intervention of a public officer. The statute being the authority, and the officer the agent to execute it, and no one being empowered to do the act except the person specially designated in the law for that purpose, it follows that a stranger to the power cannot execute it. The power is conferred upon the officer, not the man. It is an official, not a personal trust. It does not rest upon confidence, but upon official responsibility. Hence, the only security of the proprietor of the estate, is in the *official character* of the person to whom the power is committed. This security mainly depends upon the responsibility of the officer to the government, the sanctity of his oath of office, and his liability to those whose rights are violated by his

wrongful acts. It may, therefore, be safely affirmed as a general rule, that the party claiming title under a tax sale, must show that the acts required to be done under the statute, in order to divest the title of the former owner, were performed *by the officers of the law*, and not simply by persons who *assumed* to act in an official capacity. The citizen is entitled to all of the protection against fraud, rapacity and abuse of authority in the sale of his property, which official responsibility can secure.¹ It, therefore, becomes an important question to ascertain who is an officer, within the meaning of this rule. A resort to general principles is necessary in order to determine the question, especially as the authorities are conflicting. An office is defined to be, a public charge or employment; and he who performs the duties of that office, is an officer.² There is no such thing known to the law as an OFFICE *de facto*,³ nor can there exist such an anomaly as an officer *de jure*, and one *de facto*, in the possession of an office, at the same time.⁴ But it very frequently happens that one has the title, while another is in possession of the office under a claim of right. The distinction between an officer *de jure*—one who is *de facto* such—and a mere *usurper*, is well known and clearly settled, and the consequences naturally arising from these distinctions, are equally well settled. An officer *de jure* has the legal title to, and is clothed with all the power and authority of the office. He has a title against the world, to exercise the functions of the

¹ *Birch v. Fisher*, 13 S. & R. 208; *Payson v. Hall*, 30 Maine R. 319.

² *United States v. Maurice*, 2 Brock. R. 102; S. C., Marshall Dec. 470.

³ *Hildreth v. McIntire*, 1. J. J. Mar. R. 206.

⁴ *Boardman v. Holliday*, 10 Paige R. 223.

office, and receive the fees and emoluments appertaining to it. He is responsible to the government and injured parties, when he abuses his trust or transcends his authority. And his acts, when within the scope of that authority, cannot be questioned by the citizen or any department of the government.¹ An officer *de facto* is one, who comes in by the forms of an election or appointment, but in consequence of some informality, omission, or want of qualification, or by reason of the expiration of his term of service, cannot maintain his possession, when called upon by the government to show by what title he claims to hold the office. He is one, *who exercises the duties of an office, under claim and color of right*; being distinguished on the one hand, from a *mere usurper*, and on the other, from an officer *de jure*. The mere *claim* to be a public officer, or the performance of a single, or even a number of acts in that character, will not constitute an officer *de facto*: there must be some *color* to the claim, under an election or appointment, or an exercise of official functions, and an acquiescence on the part of the public for a length of time, which would afford a strong presumption of a *colorable right*.² The definition of Lord Ellenborough is probably more accurate and expressive than any other. "An officer *de facto* is one, who has the *reputation* of being the officer he *assumes* to be, and is yet not a good officer in *point of law*."³ He who intrudes himself into an office

¹ *McGregor v. Balch, et al.* 14 Vermont R. 29.

² *McGregor v. Balch, et al.* 14 Vermont R. 29; *Aulanier v. The Governor*, 1 Texas R. 658; *Plymouth v. Painter*, 17 Conn. R. 585; *Tucker v. Aiken*, 7 N. H. R. 131; *Marygate Pier v. Hannan*, 3 B. & Ald. R. 266; S. C., 5 Eng. C. L. R. 278; *Wilcox v. Smith*, 5 Wend. R. 234.

³ *The King v. The Corporation of Bedford Level*, 6 East. R. 368.

which is vacant, or ousts the incumbent, without any color of title whatever, and assumes to execute the duties of the office, is a *mere usurper*, and his acts are void in all respects.¹

The consequences naturally arising from the distinction between an officer *de jure* and one *de facto* are well settled. An officer *de jure* is clothed with all the power and authority appertaining to the office, and his acts, within the limits of his authority, cannot be questioned *any where*; while the acts of an officer *de facto* are valid so far *only* as the rights of the public or third persons, having an interest in such acts, are concerned. Neither the *title* of such an officer, nor the *validity of his acts* as such, can be indirectly called in question in a proceeding to which he is not a party. The effect of this rule is to render the acts of an officer *de facto* as valid and effectual, as though he was an officer *de jure*. The interests of the community imperatively require the adoption of such a rule. The affairs of society could not be conducted upon any other principle; without it there would be an entire failure of justice. To deny validity to the acts of such officers, would lead to confusion and insecurity in public as well as private affairs, and thus oppose the true policy of every well-regulated State. Besides, it would be unreasonable and oppressive to compel those transacting business with a public officer, before they put faith in his official acts, to go into a minute examination of all the evidences of his title to the office, and see that he has complied with all the necessary forms of law. It would constitute every citizen a judge of official titles.

¹ *Tucker v. Aiken*, 7 N. H. R. 131.

He must look to the constitution to see that the officer was eligible to an election or appointment—to the statute to ascertain when, where and how the election or appointment is required to be made—and to the poll books and archives of the State for the purpose of ascertaining the facts; and then determine at his peril the mixed question of law and fact involved in the ascertainment of official character. Again, when the controversy comes up collaterally, the officer whose title and acts are drawn in question is not a party to the record, nor can he be legally heard in the discussion of the issue, although the decision would as effectually decide his title to the office, as if he were a party. This would be judging a man unheard, contrary to the principles of natural justice and the policy of the law. The only appropriate mode of testing his title is by an information in the nature of a writ of *quo warranto*, in which after notice and an impartial hearing, he will be ousted from the office, if it turn out that he has been exercising official functions without the warrant of law. Until then, he holds the office by the sufferance of the State, and the silence of the government is construed by the courts as a ratification of his acts, which is equivalent to a precedent authority. When the government acquiesce in the acts of such an officer, third persons ought not to be permitted to question them. From considerations like these has arisen the distinction between the holding of an office *de facto* and *de jure*. It is therefore an established principle in our system of jurisprudence, that the acts of an officer thus having color of title, in the exercise of the ordinary and accustomed functions of his office, are valid in

respect to those persons who may be interested in his acts; while as respects himself, those acts are invalid.¹ It will be observed that the authorities do not proceed upon the ground that the claim of an individual to be a public officer, and his acting as such, is merely *prima facie* evidence that he is an officer *de jure*; but the principle they establish is this; that an individual coming into office by color of an election or appointment, is an officer *de facto*, and his acts in relation to the public or third persons are valid, until he is ousted by *quo warranto*, although it is clearly made to appear that his appointment or election was *illegal*. His title shall not be inquired into collaterally.² The rule it will be perceived is designed simply to protect the public by preventing a failure of justice and the great public mischief which might otherwise be justly apprehended. It gives to the officer *de facto* no immunities whatever, confers upon him no rights, and shields him from no responsibility. When sued for moneys received by him *colore officii*, he cannot avoid liability by showing that he was only an officer *de facto*.³ The same rule applies where an action is brought against him for malfeasance, misfeasance or non-feasance in office.⁴ On the other hand, when he attempts to enforce a

¹ *Plymouth v. Painter*, 17 Conn. R. 585; *Wilcox v. Smith*, 5 Wend. R. 234; *McGregor v. Balch*, 14 Vermont R. 428; *Schelenker v. Risley*, 3 Scam. R. 483; *Parker v. Baker*, 8 Paige C. R. 429; *The People v. Collins*, 7 John. R. 551; *M'Instry v. Tanner*, 9 John. R. 135; *Burke v. Elliot*, 4 Iredell R. 355; *Gilliam v. Reddick*, 4 Iredell R. 368; *Brush v. Cook*, Brayt. R. 89; *Gilmore v. Holt*, 4 Pick. R. 257; *M'Kim v. Somers*, 1 Pennsylv. R. 297; *Adams v. Jackson*, 2 Aik. R. 145; *Hoagland v. Culvert*, 1 Spencer R. 387; *Farmers' and Merchants' Bank v. Chester*, 6 Humph. R. 458; *Fowler v. Bebee*, 9 Mass. R. 231; *Douglass v. Wickwire*, 19 Conn. R. 489; *Prickett v. The People*, 1 Gilm. R. 529.

² *Wilcox v. Smith*, 5 Wend. R. 234.

³ *United States v. Maurice*, 2 Brock. R. 96.

⁴ *Fetterman v. Hopkins*, 5 Watts R. 539.

legal right which appertains solely to official character, for instance, the fees of office conferred by law, his right as an officer *de jure* is put in issue, and he cannot recover without proving a legal title to the functions and emoluments of the office.¹ And when he justifies an act complained of, purporting to be done in his official capacity, it is necessary for him to aver and prove in his defense, not only that he was an acting officer, but that he was an officer in fact and by right, duly elected or appointed, commissioned and qualified to act as such. The reason is that the officer himself is bound to know whether he is legally an officer, and if he attempts to exercise the functions of an office, without authority, he acts at his peril.²

We have thus seen that the acts of an officer *de facto* are valid, except only in cases of direct injuries to their fellow citizens.³ Such then is the rule, the exceptions, and the reasons upon which they are founded. Is there anything in the nature of the power to sell land for the non-payment of taxes, or in the legal character of those to whom the power is confided, which prevents the application of the rule in question to their acts? They exercise a *special, statutory* power—one not coupled with an interest in the thing upon which the power operates. This is true of every power with which a public officer is clothed. Take the case of a sheriff or coroner selling land under execution. They act under a special authority. Their right to sell depends upon the existence of a judgment rendered by a court having competent jurisdiction, the issuing of a valid execu-

¹ *Fetterman v. Hopkins*, 5 Watts R. 539.

² *Schelencker v. Risley*, 3 Scam. R. 483; *Blake v. Sturtevant*, 12 N. H. R. 567; *Cummings v. Clark*, 15 Vermont R. 653; *Colburn v. Ellis*, 5 Mass. R. 427.

³ *Commonwealth v. Fowler*, 10 Mass. R. 301; *People v. Collins*, 7 John. R. 554.

tion thereon, and its direction to the proper official personage to whom the law has entrusted the power of sale. Yet, in this class of cases it has been repeatedly held that if the sale is made by an officer *de facto*, it is valid and effectual to divest the title of the judgment debtor. Are not all those upon whom the law confers the power to list the land, assess the tax, and enforce its collection, officers? Chief Justice Marshall says that "An office is a public charge or employment, and he who performs the duties of that office is an officer." There is nothing, then, in the nature of the power, or in the legal character of the persons who are deputed by law to exercise it, which withdraws their acts from the operation of the rule that the acts of an officer *de facto* are valid; and the reason is equally applicable to the acts of all officers. In *Bucknam v. Ruggles*,¹ which was a writ of entry, the validity of a levy on land, made by a deputy sheriff *de facto*, was drawn in question; and the counsel who argued against the validity of the act, attempted to draw a distinction, limiting the rule to the acts of such officers as might be styled political, and who exercised a portion of the sovereign power. To this the court replied: "None of the books will warrant such a limitation. The rule as laid down extends to *all public officers*; nor can we discern any reason for restraining it."

Upon a review of the authorities, it will be seen, that while the general rule is conceded, that the acts of an officer *de facto* are valid, whenever third persons are interested in the act, yet many of the authorities affirm that the *great strictness* uniformly exacted in the divestiture of estates, under the taxing power of the government, demands an exception

¹ 15 Mass. R. 180.

to the rule, and requires proof that those who purport to act in an official capacity in the conduct of these sales, were officers *de jure*; in other words, that a regular election or appointment, and a compliance with all the conditions precedent, which must be shown by the officer himself when his title is questioned in a *quo warranto*—such as the taking of the oath of office, the execution of an official bond, etc., must be clearly proven by the party claiming title under the tax sale; and that the usual presumptions cannot be indulged in by the courts when the proof of official character is wanting.¹

On the other hand the Supreme Court of New Hampshire in *Tucker v. Aiken*,² remark that “the general principle undoubtedly is, that the acts of an officer *de facto* are valid, so far as the public or the rights of third persons are concerned; and that the title of such an officer cannot be enquired into in any proceeding to which he is not a party. But proceedings founded upon the assessment and collection of taxes have been supposed to form an *exception* to this rule; or rather a different rule has been supposed to be applicable to such proceedings. The principle is expressly laid down, that in order to maintain a title to land sold for taxes, or to justify a distress, every substantial regulation of the law must be shown to have been complied with. And it seems to have been understood that this principle included and required proof of the due election and qualification of all officers concerned in the assessment and collection of

¹ *Birch v. Fisher*, 13 S. & R. 208; *Pike v. Hanson*, 9 N. H. R. 491; *Ainsworth v. Dean*, 1 Foster R. 400; *Proprietors of Cardigan v. Page*, 6 N. H. R. 182; *Payson v. Hall*, 30 Maine R. 319; *Coit v. Wells*, 2 Vermont R. 318; *Isaacs v. Wiley*, 12 Ibid. 674; *Alvord v. Collin*, 20 Pick. R. 418.

² 7 N. H. R. 131.

the tax. *There seems to be no sound distinction between the acts of a collector de facto, in making a distress or sale of land in order to satisfy a tax, and those of a sheriff in the seizure and sale of property under attachment or execution.*" That such a distinction exists is practically denied by the authority of other cases.¹ It must be confessed that the reason of the rule giving effect to the acts of an officer *de facto*, and the weight of authorities, do not sanction a departure from the general principle which controls in *all other cases*; and the better opinion is, that where a tax is assessed, and the proceedings are conducted by officers *de facto*, the sale will be maintained. But where a mere usurper or intruder into an office, connected with such proceedings, executes any part of the authority given by law to officers *de jure* and *de facto*, his acts are nullities, and no title can be acquired under the sale. A minute examination of the adjudged cases will, doubtless, be more acceptable to the profession than any general statements of reasons and conclusions which may be deduced from them.

In *Ronkendorff v. Taylor*,² where the sale was under the charter and ordinances of a municipal corporation, and in which the court lay down the rule of strictness as the basis of inquiry in this class of cases, it was held that in order to maintain the sale, it was not necessary for the party claiming title under it, to prove the appointment of the assessor who listed and valued the land, but the court would presume, from the fact that he acted as assessor, and was recognized by the authorities of the corporation as such, that he was legally appointed.

¹ *Sheldon v. Coates*, 10 Ohio R. 278; *Downer v. Woodbury*, 19 Vermont R. 329; *Hale v. Cushing*, 2 Greenleaf R. 218; *Spear v. Ditty*, 8 Vermont R. 419; *Adams v. Jackson*, 2 Aiken R. 145; *Ronkendorff v. Taylor*, 4 Peter's R. 349.

² 4 Peter's R. 349.

In *Hale v. Cushing*,¹ the validity of a tax sale under the act of Congress was questioned. The act required the assistant assessor to be sworn, and a certificate of the fact returned and filed in the collector's office. This was not done, but it was proven by the assessor himself that he was sworn prior to entering upon the duties of his office. The court held the requirements directory, and that an omission to conform to it ought not to prejudice the rights of the purchaser; and further, there being no record of the oath, the testimony of the assessor himself was competent evidence to establish the fact that he was sworn. On the other hand, in *Pike v. Hanson*,² which was an action of trespass—the defendant justified as a collector of taxes, under an assessment and warrant to collect—it appeared that the assessor had not taken and subscribed the oath required by statute before making the assessment. The court held that the collector could not justify upon this state of facts, remarking that “this provision of the statute cannot be deemed merely directory. It was designed for the protection and security of the citizen, whose rights are in some degree in the discretionary power of the assessors. The Legislature intended, by the oath thus formally to be taken and subscribed by the assessors, to guard as far as possible against all abuse of this discretion, and we cannot dispense with so important a requisition.” This doctrine was reaffirmed in *Ainsworth v. Dean*,³ and a sale of land for taxes held void because there was no evidence that the assessment was made under the sanction of an oath. And in *Birch v. Fisher*,⁴ the evidence showed only that the persons who made the assessment were recognized

¹ 2 Greenleaf R. 218. ² 9 N. H. R. 491. ³ 1 Foster R. 400. ⁴ 13 S. & R. 208

as officers by the county commissioners, and that they acted as such. The sale was held void. By the court: "Will it be pretended that such an assessment would be valid, or that a sale under it would confer any right? An assessment by persons neither elected, nor sworn, would be an assessment, not by officers *de facto*, but by *intruders*, who came in without *color of authority*. The evidence offered was the book of the county commissioners, showing the names of the assessors; and the certificate of the clerk, that he had searched the files for the election returns, and the official oaths of the assessors, and found none. The election returns ought to have been produced, or their existence established and absence accounted for. The evidence offered was not the best that could have been produced."

In New Hampshire the law required that the *appointment* of the collector must be in writing and recorded. This requirement was not conformed to, and the collector's sale held void for that reason.¹ In another case, *it did not appear, from the return* of the selectmen, who called the town meeting at which the collector was appointed, and a portion of the tax raised, when or where the notice was posted up. On the back of the warrant, notifying and warning the freeholders, was this certificate: "March 12, 1822, *lawfully* posted a true copy of the within articles.

D. ATWOOD, }
S. COLE, } *Selectmen."*

The sale was held void. The court say that "when meetings are warned by selectmen, they must make a proper return of their doings. They stand in that business in place of constables, and their return must show, not simply that notice has been given, but that

¹ *Ainsworth v. Dean*, 1 Foster R. 400.

such notice as the statute directs, has been given. They are public officers authorized by law to warn town meetings. It is their duty to make a return of their doings. If they make a false return, they are liable to an action in favor of him who may thereby be injured. And, in our opinion, their return is, in this instance, the only evidence which can be admitted to prove what they have done. In our opinion, much greater mischief will result from giving countenance to the careless and imperfect returns which have already been made, than from holding a legal and sufficient return to be essentially necessary in all cases. It is neither safe nor expedient to leave the title to real estate to depend, in any case, upon the uncertain and fading memory of mortal man. It is not the policy of this State to do so. All conveyances, by one man to another, must be in writing; when an execution is extended upon land, there must be a return in writing, otherwise it is without effect; when lands are sold for taxes, the former owner ought to be able to learn from the records of the proceedings, whether his title has been lost. He ought not to be put to the expense of a law suit to learn whether his land has been legally sold. It is, in our opinion, much better that a few titles should now fail for this defect, than that all titles of this description should be left in doubt and uncertainty.”¹

It was held in *Payson v. Hall*,² that in order to maintain title under a tax sale, it is not sufficient to show that the person making the sale, had been chosen collector, and acted in that capacity, but to

¹ *Proprietors of Cardigan v. Page*, 6 N. H. R. 182.

² 30 Maine R. 319.

render the sale valid, it is indispensable that he take the oath of office prescribed by law. The reasoning of the court was, that "One injured by the misconduct of a collector of taxes, cannot be protected by a resort to his official bond for redress, that being given for the security of the town alone. He must be permitted to avoid the acts of one, assuming without lawful authority to be a collector, or be in many cases without a remedy: if a person without election or legal qualification could act as a collector of taxes, and as such make sale of an estate, and the production of a deed made by him in that capacity were to be considered as effectual without proof of his election and qualification, there would be no effectual security for the faithful discharge of his duties. Such was not the intention of the legislature. The party is required to produce the *collector's* deed, not the deed of a person *assuming* without right, to act in that capacity. The tax payer is entitled to have his interests protected in the sale of his property by the obligations imposed by the *official oath*." The same doctrine was maintained in New Hampshire;¹ but the propriety of it is questioned in a later case.² And in *Adams v. Jackson*,³ which was an action of ejectment, wherein the plaintiff claimed title under a tax deed made by a constable, the appointment of the constable was shown, but the proof was defective as to whether he took the oath of office. The inferior court held the sale invalid, but the judgment was reversed. In *Coit v. Wells*,⁴ which was an action of ejectment, the defend-

¹ *Proprietors of Cardigan v. Page*, 6 N. H. R. 182.

² *Tucker v. Aiken*, 7 N. H. R. 131.

³ 2 Aiken's R. 145.

⁴ 2 Vermont R. 318.

ant claiming under a collector's sale, for a special road tax, levied by the commissioners of highways, it appeared that the collector did not give bond until the day of sale, and the only evidence of that fact, was a receipt by the commissioners, dated the day of the sale, acknowledging that they had received "*such a bond as the law requires.*" The statute required, that the collector *before* entering upon the duties of his office, should give bond with security to the commissioners, in at least double the amount of the tax, conditioned that he would faithfully discharge the duties of his office. Sale held void. By the court: "The bond is to be the security, that the money received shall be paid to the commissioners, and go to subserve the objects of the tax, that the land owners may not pay their money, and yet fail of the roads, which are intended to operate to their benefit, by adding value to their lands. Now the collector, as soon as he receives his rate bill and warrant, proceeds to receive the money for the taxes, and advertises his sale. These are *official acts*, and he must give bond before he commences these acts, or his sales are void. In such cases the advertisement is not the act of the collector, but of the individual, and is of no validity." So in *Isaacs v. Wiley*,¹ where the defendant claimed title under a sale for taxes, it appeared that the collector who made the sale had not given such a bond as the law required, and the sale was held a nullity, the court saying: "The argument which has been attempted, that as the bond is for the security of the committee alone, any bond to their acceptance, should be held a compliance with the statute, is not a little plausible,

¹ 12 Vermont R. 674.

but at the same time, is unsatisfactory. We hold the giving of a bond, *and such a bond as the statute requires*, to be indispensable to pass the title, not because we consider that the public, or the land holders, have any indirect interest even in the security which it affords, but because a strict compliance with all the prerequisites of the statute is considered necessary, in this class of cases, in order to pass the title." On the other hand, it was objected in *Spear v. Ditty*,¹ that the collector's bond was insufficient, because the penalty was not equal to double the amount of the tax originally laid. By the court: "It is difficult to perceive how this irregularity, if it be such, can have any reasonable bearing upon the right of the plaintiff. The object of this bond is not the security of the land owner against an illegal enforcement of the tax, but it is to insure a proper accountability for the tax after it is collected. It is not one of those safeguards, interposed between the tax gatherer and the tax payer, but has reference to the public interest, in due accountability for, and expenditure of the tax. When this object is effected, the purpose of the law is answered. It is only necessary that it should be in double the amount of the tax on the tax bill delivered to the collector. That is the case here. Part of the taxes may have been worked out. If otherwise, the law is directory." *Downer v. Woodbury*² was an action of trespass against the collector, who, in his plea, alleged that he had given bond, but did not describe or make profert of it. On the trial it was proved that the defendant had acted as collector, and the court presumed that he had given bond as required by law. Again, in *Hale v. Cushing*,³ which

¹ 8 Vermont R. 419.² 19 Vermont R. 329.³ 2 Greenlf. R. 218.

was an action of entry *sur disseizin*, the tenant claimed under a tax deed made by a collector of the direct tax, levied under the act of Congress, and it did not appear that the collector had given bond. Sale held valid. By the court: "The bond was intended for the security of the United States; but as regards the purchaser under a sale by the collector, and the original owner of the land sold, it is a subject of no importance." The statute of Ohio provided, that before receiving the tax duplicate, the collector should give bond, &c., and if he failed to do so before the first Monday in August, a collector should be appointed by the county commissioners; and the law further provided, if he neglected to file such bond within the time prescribed, the clerk of the Common Pleas Court was directed to withhold the duplicate, which constituted the authority of the collector. In *Sheldon v. Coates*,¹ which involved the validity of a tax sale, it appeared that the collector did not file his bond until September 10, 1805, that the duplicate was delivered to him on the *twentieth* of the same month, and that no new appointment of a collector had been made by the county commissioners. Upon this point the sale was sustained. By the court: "In this case, as the bond was executed before any appointment had been made of a collector, by the county commissioners, although not within the time prescribed, it would be against the whole current of the decisions of this court, in similar cases,² to hold that the acts of the collector were void or voidable upon that ground."

¹ 10 Ohio R. 278.² 5 Ohio R. 136; 10 Ibid. 51.

CHAPTER V.

OF THE LISTING AND VALUATION OF THE LAND.

A listing and valuation of the land for taxation, within the time, and in the manner required by law, is essential to the validity of a tax title. This is a prerequisite which cannot, under any circumstances whatever, be dispensed with. In a double sense, it is an indispensable prerequisite; *first*, to satisfy the plain and unequivocal demands of the statute; and *second*, to give life and energy to the statute itself. It is the basis upon which all the subsequent proceedings rest. All of our constitutions require, either in express terms, or by necessary implication, that taxes shall be uniform and equal in their operation; in other words, that each and every citizen shall pay a tax in proportion to the value of his estate. A periodical listing and valuation of all the property within the jurisdiction of the taxing power, is therefore absolutely necessary, in order to carry into practical effect this constitutional requirement. To hold otherwise, would be to pronounce the revenue laws unconstitutional and void, and deprive the citizen of all manner of protection against unjust and oppressive taxation. The listing and valuation of the property usually precedes the levy of the tax; indeed, this is universally true whenever the tax is levied by a coun-

ty, town, or municipal corporation acting under the authority of the Legislature. The taxes necessary for the support of the State government are fixed by public law ; but inferior jurisdictions are limited in their power of taxation. The purpose for which the tax is raised is specified in the law, and the maximum rate of the levy is established, beyond which they cannot go. The practical operation of each levy, and the absolute necessity of a list and valuation may be thus illustrated. Suppose that by the lists returned from each county, it appears that the aggregate valuation of all the land in the State is one hundred million of dollars. The Legislature direct the assessment of five mills, for State purposes, upon each dollar's worth of property embraced in the list. The assessor performs the ministerial duty of charging the tax thus levied upon each parcel of land in the list, according to its appraised value. Upon this valuation, the produce of the State tax would be five hundred thousand dollars. Again, a county is authorized to levy a tax, to meet its current expenses, not exceeding the rate of five mills to the dollar. The list of that county shows an aggregate valuation of one million of dollars. The produce of such tax, taking the maximum rate, would be five thousand dollars. In each case the citizen is bound to contribute according to the valuation of his estate. One is the owner of property to the amount of ten thousand dollars, while another owns but one thousand dollars' worth. The former will be charged one hundred dollars for State and county taxes, and the latter but ten ; and the sum thus chargeable to each is set opposite to the description of his estate in the list.

It will thus be seen that the listing and valuation

of the land is the basis of the assessment of the tax, and that each citizen is directly interested in the list. By it alone can the legality of the tax be tested; this is his only security against an unequal tax. Again, in most of the States, a duplicate of this list is delivered to the collector, and this constitutes his authority to demand the tax, distrain the goods and sell the land of the delinquent. Besides, the collector is charged with the tax according to the list, and the list is the basis of his settlement with the State and county. Thus the listing and valuation constitute the security of the citizen, the foundation of the assessment and all the subsequent proceedings, the authority of the officer to collect the tax, and the basis upon which the settlements of the collecting officers are made.¹

The ordinary signification of the term *list*, is a roll or catalogue. In its technical sense it means a complete enumeration of the owners of property in a collection district, together with a description and valuation of their property, made periodically, with a view to equality and uniformity in the levy of taxes. It is variously called *tax list*, *rate bill*, *assessment roll*, according to the laws and usages of the respective States. In *Homer v. Cilley*,² a novel state of facts existed, to which this definition was applied. The New Hampshire statute required the collector, on or before a particular day, to make out and deliv-

¹ *Graves v. Bruen*, 11 Illinois R. 431; *Tibbetts v. Job*, Ibid. 453; *Schuyler v. Hull*, Ibid. 462; *Job v. Tibbetts*, 5 Gilm. R. 376; *Nalle v. Fenwick*, 4 Randolph R. 591; *Kinney v. Beverly*, 2 Hen. & Munf. R. 318; *Lessee of Holt's heirs v. Hemphill's heirs*, 3 Hammond R. 232; S. C., 14 Ohio Cond. R. 551; *Lessee of Dresback v. McArthur*, 6 & 7 Ohio R. 307; *Thurston v. Little*, 3 Mass. R. 429; *Games v. Stiles*, 14 Peter R. 322; *Adam v. Litchfield*, 10 Conn. R. 127; *Whitelsey v. Clinton*, 14 Ibid. 72.

² 14 N. H. R. 271.

er to the deputy secretary of State, a copy of his *tax list*; the deputy was required to retain the list and receive taxes for a limited time, and it was then to be returned to the collector. Until this was done, the collector possessed no power to advertise and sell the land. The supposed list embraced a single parcel of land, in an unincorporated place, called "Dame's Gore," the owner of which, was a non-resident of the State, the only character of delinquents to whom the above recited statute applied. It was insisted that the list ought to be produced to show the authority of the collector to sell the land; but it was contended by the counsel who maintained the validity of the sale, that inasmuch as the tax was against a single parcel of land, and not against divers persons and tracts, the collector had no list, and therefore no copy could be produced. But the court replied: "The signification thus given to the term '*list of taxes*,' is quite too confined. Although the term *list* ordinarily signifies a roll or catalogue, yet a roll does not always contain a number of names, or several particulars. There can be no doubt that this collector was as much bound to return a copy of the non-resident taxes, where there was only one tract taxed as non-resident, as where there were fifty. There was a list of taxes in the first case, within the meaning of the statute, as much as in the last, and so in the present case."

As the list is the foundation of all the proceedings, it is the duty of the purchaser at the tax sale, or those claiming under him, except where the *onus probandi* has been changed by law, to produce the original, or in case of its loss or destruction, a duplicate or counterpart; if there should be no duplicate, then

an examined or sworn copy ; and if there is no duplicate or examined copy, then parol evidence may be given of its contents.¹ Parol evidence, in such a case, is looked upon by the courts with a suspicious eye, and will never be admitted until other means of establishing the truth have failed. Perhaps upon principle, such evidence ought not to be received at all. Independent of the policy of the law, to require a complete record of the proceedings to be made and preserved, for the protection of the interests of the purchaser and former owner, the temptation to a fraudulent suppression or destruction of the missing document is so great, and the extreme improbability of any one connected with, or cognizant of the proceedings, being able to recollect the distinct facts connected with the listing and valuation of each tract of land, upon a list embracing all of the taxable lands in a county or other district, renders it extremely unsafe for either party to resort to this species of evidence. Besides, in most every State, duplicates of the list are required to be filed, or the original recorded in some public office ; the original or a copy is usually retained by the assessors, and another duplicate is invariably placed in the hands of the collector for the time being ; and it would therefore seem impossible, unless in case of a general conflagration of the records and files of all public offices connected with the proceedings, or the fraud of one of the parties interested in the list, that a necessity should ever arise for the introduction of such evidence. However, in support of a long possession, such evidence might very properly be submitted to a jury.

¹ *Nalle v. Fenwick*, 4 Rand. R. 591 ; *Doe ex. dem. Kelley v. Craig*, 5 Iredell R. 129 ; *McCall v. Lorimer*, 4 Watts R. 351.

When the original, its counterpart, or examined copy is produced, the first inquiry will naturally be, is it an *official* document? And this will depend upon the fact, whether the person or persons who made it, had authority, under the law, to take a list and make a valuation of the taxable property within the district where it purports to have been made. When the list is made out by an officer *de jure*, the official character of the document, of course, cannot be gainsaid. When made by an *usurper*, or intruder into the office, it is equally certain that it is unofficial and void to all intents and purposes.¹ But when made by an officer *de facto*, especially one who is so regarded, because he has neglected to take the oath of office prescribed by law, *i. e.*, that he will make a true and perfect list of, and fairly and impartially value the lands which are liable to assessment within his district, the official character of the document is more questionable than any other act performed during the whole course of the proceedings. It is not only the substratum of the whole series of acts to be performed—the incipient step in the divestiture and acquisition of title—but it would seem that an official valuation, under the sanction of the oath of office, is the only security the tax payer has against illegal taxation. It is conceded that the authorities are in conflict upon this point, and the subject may be dismissed by a reference to the preceding chapter, which relates exclusively to the election and qualification of officers.

Where authority is conferred by the statute, upon several persons, to list and value lands for taxation, all should convene together, because the advice and

¹ *Birch v. Fisher*, 13 S. & R. 208.

opinions of all may be useful, though all do not unite in the decision; but it is not essential that all should concur in the judgment—the act of a majority will be binding. This is in accordance with the general principles of law. Where a private authority is delegated to several persons, all must join in its execution; while in matters of public concern the act of the majority is conclusive. In matters purely ministerial, such as the listing of the land, there is no difficulty in procuring the concurrence of all, because there is nothing concerning which they can differ; but where the judgment is to be exercised, as in the valuation of the lands upon the list, the inconvenience in requiring unanimity, is extreme, and but for the rule which sanctions the act of the majority in such cases, there would oftentimes be a failure of justice, and great injury to the government would necessarily ensue. Where the list is signed by a majority only of the number, the presumption of law is, that all were consulted; but where the evidence shows that all did not convene and consult together, the list will be held invalid.¹ In *Middletown v. Berlin*,² an assessment list of the district of Westfield, in the town of Middletown, for the year 1835, made up and signed by Luther Bowers, assessor, and by him lodged in the town clerk's office, was offered in evidence to establish the legality of a tax. In this connection it appeared that there was a board of assessors in that town, consisting of five persons, duly chosen, qualified and acting, and there was no

¹ *Doughty v. Hope*, 3 Denio R. 594; *Ex parte Baltimore Turnpike Co.*, 5 Binney R. 481; *Kinney v. Doe ex. dem. Laman et al.*, 8 Blackf. R. 350; *Middletown v. Berlin*, 18 Conn. R. 189; *Powell v. Tuttle*, 3 Comst. R. 396.

² 18 Conn. R. 189.

evidence showing that the assessment had ever been seen, heard of, or sanctioned by the board. It further appeared that the town was divided into districts, and that it was the usage of the town for each assessor to act independently of the others. The statute required the *board* of assessors to act in making the assessment. This evidence was excluded by the court below, and a verdict rendered accordingly—motion for a new trial in the Supreme Court, and overruled. By the court: "The assessment lists of the several towns are the only rule and basis upon which counties, towns, and other communities, can levy taxes. These must be legal, or the taxes laid and apportioned upon them, cannot be. This was not the act of the board, which consisted of five persons, and this purports to be the act of one of them only. The rule governing the execution of public and private powers, has long been settled. A power conferred upon two or more persons, by individuals, for private purposes, must be executed by all; but an authority imposed by law for public purposes, may be executed by a majority, if all have been legally notified to act. It is believed that no case can be found, which will justify the performance of a duty required of an aggregate body, by one only, as has been attempted here. *Assessors are the officers of the law, and must obey the law; and no direction of the town, or long continued usage, can justify a departure from the law.*" In *Kinney v. Doe ex. dem. Laman et al.*¹ which was an action of ejectment to recover a town lot, the defendant relied upon a tax title acquired under a sale for county taxes, due upon the lot in question, for the year 1822; and in attempting to

¹ 8 Blackford R. 350.

prove the regularity of the proceedings, offered in evidence the assessment roll of county taxes for that year, signed by the lister, *without proving that the valuation had been made by the lister and two householders*, as required by the act of 1820. This evidence was rejected by the Circuit Court, and an exception taken to the ruling. The judgment was affirmed. Blackford, J.: "We think the decision of the court is right. The evidence was not admissible without proof that the assessment had been legally made. It could not be legally made, so far as the valuation of town lots was concerned, except by the lister and two householders appointed by him.¹ The assessment roll, therefore, was inadmissible, &c., without proof that the lots had been valued by the lister *and two householders*."

The list must be verified by the official signature of the officer charged by law with the duty of making it. The object of this rule is the identification of the document as an official act, executed by the authority of the law; and its spirit is answered only, when the official character of the person making it is established, and the document appears upon its face to be an official act, attested by the signature of the proper officer. The reasons and illustrations of this rule will more fully appear hereafter.² In *Johnson v. Goodridge*,³ where the law directed the selection of three assessors, and required them to "*make perfect lists under their hands*," the facts were, that a list of lands belonging to resident and non-resident proprietors, was made by two of the assessors. It contained several pages, the first and second of which, embraced the lands of non-residents; the residue of the

¹ Acts 1820, p. 150.

² Chapter 18.

³ 15 Maine R. 29.

pages contained the lands of residents. The only authentication of the list was at the commencement of the first page, in these words:

"To Jonathan Goodridge, *Collector*: Fine tax on the highways, for 1832, assessed on the estates of *non-residents*, by

WENTWORTH TUTTLE,	} <i>Assessors of</i>
ISAAC HOLT,	
	} <i>Canaan.</i> "

The listing and assessment were held void. The court say: "All that can reasonably be required, is to accomplish the object designed by the statute, which is, that the lists should bear upon them the official sanction of a majority of the assessors, evidenced by their signatures. If a majority sign the lists in such a manner as to show that the intention was thereby to give them their official sanction, that may be sufficient, on whatever part of the lists it be made. But the intention or object of the signature must clearly appear. It must be a signing for the purpose of special authentication. It is difficult to say that any more of these lists, than the pages bearing the assessments upon non-residents, are so authenticated. The assessors *limit* their signatures to taxes on the estates of non-residents, and the words 'non-residents,' being a proper description of certain portions of the tax lists, cannot be rejected as words without meaning." In *Sibley v. Smith*,¹ where the statute required the assessment roll to be signed by the assessor, and it was omitted, the sale based upon it was held void. The statute of Maine required the assessors to "make perfect lists of their assessments, under their hands, &c., and commit the same to the collector, with a warrant under their hands and seals,

¹ 2 Mich. R. (Gibbs,) 498.

&c." In two cases the lists were not so signed, but the warrants *in the same paper book were*; and the court held that a signing of the list was an essential requisite, that it must bear upon its face evidence of its official sanction, and until thus signed was an incomplete and void act—"an unfinished proceeding."¹ In an action upon the collector's bond, where the lists were in his possession, the court presumed that they had been duly authenticated by the official signatures of the assessors.² And under an act of the Pennsylvania legislature, which declared "that no irregularity in the assessment, shall be construed to affect the title of the purchaser, but the same shall be declared good and legal," the court held a sale valid *where the assessor had neglected to sign the ROLL.*³

The power of the assessor is limited and special. It is confined to estates lying within his district. It follows, therefore, that if he list and value lands not within his town or county, his jurisdiction is exceeded, and the proceeding, to that extent, is void.⁴ The Ohio statute,⁵ made it the duty of the county auditor to call on each resident owner of land within his county, and take a list of all his lands subject to taxation within the county; with a proviso, that "all lands lying within the Virginia Military District, *which shall be divided by county lines*, so as to leave parts of said tracts in two or more counties, shall be listed by the proprietor in the county where he lives." Another section⁶ made it the duty of the auditor, on the failure of the owner to furnish a list, to enter the

¹ *Colby v. Russell*, 3 Greenlf. R. 227; *Foxcroft v. Nevins*, 4 Ibid. 72.

² *Kellar v. Savage*, 20 Maine R. 199.

³ *Townsen v. Wilson*, 9 Pa. State R. 270.

⁴ *Thurston v. Martin*, 3 Sumner R. 497.

⁵ 1820, Sec. 9.

⁶ Sec. 13.

land from the best information in his power. In the case of the *Lessee of Hughey v. Horrell et al.*,¹ which was an ejectment wherein the defendant relied upon a tax title, it appeared that the land in question was divided by the line between Madison and Pickaway counties, and the owner lived upon that part of the land which lay in Pickaway. The county auditor of Madison entered the land upon his list, in the name of Prichard, the real owner. The sale was held void. The court said, that "as the land in question was in the Virginia Military District, and divided by a county line, and as Prichard, the proprietor in whose name it was listed, resided in the county of Pickaway, the auditor of Madison *was not authorized to enter it on his list*. It was made the duty of the proprietor to enter it in the county in which he lived, and on his failure to do so, it ought to have been entered by the auditor of Pickaway. It is evident, therefore, that this land has not been entered in conformity with the statute, and that it has been sold by an officer who was not authorized by law to make the sale." The New York statute enacted, that "where the line between two towns divides any occupied lot or farm, the same shall be taxed in the town where the occupant lives, provided he or she live on the lot." In *Saunders v. Springsteen*,² it appeared that the defendant in error was the owner and occupant of a farm, covering parts of two lots numbered twenty-six and thirty-four. This farm was divided by the town line between Lewiston and Cambria, the division line of the towns being also the dividing line between said lots. The dwelling-house of the defendant in error was upon the part of the farm in

¹ 2 Ham. R. 231 ; 14 Ohio Cond. R. 335.

² 4 Wend. R. 429.

Cambria, his barn was in the town of Lewiston. The entire farm was assessed in Cambria in 1826, and the assessor of Lewiston, with a full knowledge of the facts, also assessed that part of the farm lying in his town, upon which a tax was collected. It was held that the last assessment was void.

Under the curative act of Pennsylvania it was held that where lands were listed for taxation in the wrong county, the sale was nevertheless valid.¹ This decision does not appear to give a fair construction to the act, the language of which was, "that no *irregularity* in the *assessment* shall be construed to affect the title of the purchaser." The evident intention of the Legislature, as manifested by the words they used, and the spirit of the provision, was to cure a defective assessment, where the assessor had jurisdiction, but proceeded irregularly in the exercise of it, and not to declare that to be an assessment which was a *nullity* for want of authority to make it. Suppose a *mere usurper* makes the assessment, and the fiscal agents of the county or town recognize it, and cause the list to be placed in the hands of the collector *de jure*, who proceeds to collect the taxes and sell the lands of delinquents upon such a list. Could it be pretended that there was any vitality in such a proceeding? Surely not; it is simply *no assessment* at all, and when the courts declare it to be valid under the curative act, they go one step beyond the Legislature. The latter, presupposing that an assessment has been made in point of fact, but presuming that irregularities have taken place in the course of the proceedings, declare it valid; while in the former, the courts, usurping the functions of an assessor *de jure*, make one, and by

¹ *Montgomery v. Meredith*, 17 Pa. State R. 42.

judicial legislation pronounce it legal. The same may be said of the case where land is listed which does not lie within the territorial jurisdiction of the assessor. The assessment is said to be in the nature of a judgment and execution against the delinquent tax payer, and constitutes the warrant of the collector to sell. Yet, in the Pennsylvania case, the court give to a *pretended* assessment a validity which the judgment of the highest court of the land does not possess. Where a superior court of general jurisdiction has not authority in the particular case, its judgments are simply nullities.

The Illinois statute of 1827 required that all lands belonging to residents of the State should be listed in the county where the owner resided. The act of 1829 declared that the list should be completed by the first day of July annually, and by the same act the county clerk was directed to transmit to the auditor of State, a list of all lands in his county which had not been listed there by the fifteenth day of July, and all such lands thus returned were to be sold by the auditor as non-resident lands. The statute also, according to the decisions of the Supreme Court, made the auditor's deed *prima facie* evidence, amongst other things, that the land was regularly listed for taxation. In *Messenger v. Germain*,¹ it appeared that the sale was made by the auditor, January 16, 1830, upon the authority of a list returned the preceding year, by the clerk of St. Clair county, where the land in question lay. For the purpose of showing that the land was not legally listed and sold, it was proven that at the time of the auditor's sale, one of the owners resided in the county of St. Clair, and the other

¹ 1 Gilm. R. 631.

in Jo Daviess county, Illinois. Upon this state of facts, the court held, *first*, that they would presume that the owners had failed to list in the counties where they respectively resided; and *second*, that proof that on the day of sale one of the parties resided in St. Clair, furnished no legal presumption that he resided there when the list of non-resident lands was transmitted by the clerk to the auditor.

In many of the States the law requires the listers to return, file or lodge the original, or an attested copy of the list, or an abstract thereof, with some public officer designated, on or before a certain day named. The object of this requirement is to enable the tax payer to inspect the list, and take such steps as he may deem necessary for the purpose of correcting upon appeal, motion or otherwise, any errors in the listing and valuation which have taken place to his prejudice. It has been repeatedly held that a failure on the part of the listers to perform this duty, renders the list and all of the proceedings founded thereon void. Thus in *Kinney v. Beverly*,¹ where the law required a listing and assessment of the land for taxation, and a return of the list to the auditors, and this requirement was not complied with, the assessment and sale founded thereon was held to pass no title to the purchaser. The statute of Connecticut required the assessors, after completing the list, to return an abstract thereof to the town clerk, on or before the first day of December annually. The clerk was directed to submit, when requested, to the inspection of every person liable to pay taxes, the abstract thus required to be returned. A board of relief was constituted to hear appeals from the doings of the

¹ 2 Hen. & Munf. R. 318-344.

assessors, and having given ten days' notice, the board were required to meet on or before the first Monday in January, to determine the appeals made to them. Another act was passed in May, 1829, providing "that where assessors have *heretofore* neglected or omitted to sign or return an abstract of the assessment lists of their respective towns by them made, and to lodge the same in the town clerk's office, by the first day of December in any year, etc., such assessment lists shall not, for such causes, be considered or adjudged void; but all taxes which have been *heretofore*, or shall be hereafter, laid and imposed *according* to such assessment lists, may, notwithstanding, be levied and collected." The case of the *Thames Manufacturing Co. v. Lathrop et. al.*,¹ which was an action of trespass *de bonis asportatis* against the selectmen of Boziah, to test the validity of a town tax, was pending and undetermined at the time of the passage of the last named statute. In justification, the defendants proved that the town of Boziah had voted a tax upon the list of 1827. The list was duly made out, but an abstract of it was not left with the town clerk until the twentieth day of December, 1827. After the first day of that month, the plaintiffs repeatedly called at the clerk's office to inspect the list, but an abstract of it was not there. The board of relief met, after due notice, on the last Monday in December, but the plaintiffs did not attend its sittings, or apply for relief against the assessment. The defendants also produced the rate bill, based upon the said assessment, in which the plaintiffs were taxed sixty-five dollars and eighty-five cents; also a warrant to collect the tax, which was delivered to the collector, under which the goods in question were

¹ 7 Conn. R. 550.

seized and sold in satisfaction of the tax. Upon this evidence the inferior court charged in favor of the plaintiffs, who had a verdict, and the defendants moved for a new trial for misdirection. The Supreme Court overruled the motion, and rendered judgment upon the verdict, holding, 1. That the general law requiring the abstract to be lodged with the town clerk by the first day of December, was an imperative and not a directory requirement; 2. That the act of 1829 should be confined to the levy and collection of taxes which had been previously laid upon defective assessment lists, but which remained unlevied and uncollected when the law took effect, and to assessments which might thereafter be made. That it could not extend to assessments on which taxes had already been levied and collected, so as to affect actions of trespass then pending; in other words, the retrospect of the statute operated upon assessments and collections in *feri*, and not to those which were executed and closed.

Chief Justice Hosmer, in delivering his opinion, remarks upon the first point as follows: "This direction is imperative, and is alone alterable by the legislature. The court must take the law as they find it, and cannot say that a return after December the first is valid, unless they assume the character of law makers. The reason of this legislative provision is apparent. It is for the general benefit of every inhabitant of our towns, that each may inspect the list of his estate, and if he believes that injustice has been done him, that he may appeal for its correction to the board of review. That a time for the return of the lists should be limited, the general convenience demands; and that it should be sufficiently early, for

universal inspection, and preparation for a future hearing before the board of review, is perfectly obvious. On this principle the legislature fixed the first of December as the ultimate period of return. That the return should be punctually made, is indispensable. A different principle would nullify the law, and produce the general inconvenience arising from an unlimited return. No person, in such case, could know when he might inspect his list; and if the return was late, no time, either for reflection or preparation for a review, could be had. If the legislature, in a charter of incorporation, had authorized the laying of taxes upon lists returned to a public office at a specified time, the necessity of a strict observance of the limitation would not admit of a question.¹ The case before us is strictly analagous to the one supposed. The general law is an enabling act to all our towns; it has prescribed the subjects of taxation, and the mode, and as there is no authority to tax, except what is conferred by the law, it must be strictly observed. An illegal and void assessment is no assessment at all; it is a nullity, and authorizes no person to act under or enforce it." A similar decision was made by the Supreme Court of Illinois in the case of *Marsh v. Chesnut*.² The revenue law required the assessor to complete his assessment, and return the same to the clerk of the county commissioners' court, on or before the first day of May; and it authorized parties interested to apply, at the ensuing June term of that court, for the purpose of having the valuation of their property reduced. The list was not returned until June 3, which was the day of

¹ 2 Cra. 127; 3 B. & A. 1; 5 Taunt. 792; 5 Conn. R. 560.

² 14 Illinois R. 223.

the sitting of the court. Treat, Ch. J.: "The object of this provision is manifest. It is, that the owner shall have ample time and opportunity to ascertain the valuation put upon his property by the assessor, and if deemed excessive, to make application to the court for the correction of the error. It was the intention of the legislature that at least one month should intervene between the return of the assessment and the sitting of the court having the power to revise the doings of the assessor. This interval of time is allowed the owner to inspect the return, and prepare for the hearing of his objections to the assessment. This requisition of the statute is clearly imperative. It is made for the benefit of the owner, and cannot be dispensed with without his consent. A failure to observe it may seriously injure him. The courts have no power to declare it to be directory merely. Such a decision would virtually deprive a party of the protection which the legislature designed to afford him. Under such a construction of the law, the return might not be made until the court had adjourned, or at so late a day that he would have no opportunity, either to examine the assessment, or make preparation to have it reviewed by the court. In either case he would lose the benefit of an appeal from the assessment, for the statute expressly provides that no application to reduce the valuation shall be made after the June term of the court. When this assessment was made, the law required the county commissioners' court to commence its session on the first Monday of June; and the first Monday of June, 1839, (the year the assessment was made,) was the third day of that month, so that the return of the assessor was not, in fact, made until the term

of the court had commenced. The defendant had, therefore, no previous opportunity to inspect the return and prepare an application for a reduction of the assessment. We have no doubt that this direction to the assessor was intended to be compulsory, and that a failure by him to comply with it, renders the assessment invalid as against the owner of the land. The proceedings prescribed by the revenue laws are of a special and summary character, and contrary to the course of the common law. The result may often be to deprive a man of his property without any actual knowledge by him of the proceedings against it. It is a sound and inflexible rule of law, that when special proceedings are authorized by statute, by which the estate of one man may be divested and transferred to another, every material provision of the statute must be complied with. The owner has the right to insist upon a strict performance of all the material requirements; and especially of those designed for his security, and the non-observance of which may operate to his prejudice. On this principle alone, the direction to the assessor to make his return by a given day, is compulsory, and its performance is indispensable to the validity of the assessment. Without a valid assessment, the subsequent proceedings necessarily fall for the want of a basis upon which to rest. The case of the *Thames Manufacturing Company v. Lathrop*, 7 Conn. 550, is directly in point." Another branch of this case arose upon the construction of the two following statutes. 1. The act of February 8, 1849, which provided that all assessments for the year 1848 and prior years, "which were not completed within the

time required by law, be, and the same are hereby declared to be as good, valid and effectual, as if they had been made and returned in strict conformity to law." 2. The Act of February 15, 1851, which declared that when any assessor had theretofore or should thereafter fail "to complete or finish his assessment in the time required by law, such failure shall not vitiate such assessment, but the same shall be legal and valid as if the same had been completed in the time required by law." It was insisted that these Acts cured the defect in the assessment; but the court, doubting the power of the legislature to pass retrospective laws of this character, proceed to say, "but they may be so construed as not to embrace cases like the present, and, at the same time, full effect be given to their provisions. We think it was the intention of the legislature to legalize assessments that had not been perfected within the time prescribed, and upon which further proceedings were to be had; and not to interfere with assessments where nothing remained to be done under them. This was the full scope and design of these statutes." The case of *Billings v. Detten*¹ arose upon the construction of the 21st section of the Act of March 3, 1845, which required the assessment to be completed and returned by the first Monday of August, and the 26th section of the same Act which authorized an application by the owner for a reduction of the assessment at the September term, and not afterwards. The assessment in question was for the year 1845, and was not returned until October 30. The defense relied upon the same curative Acts above

¹ 15 Illinois R. 218.

recited, and the special Act of February 5, 1849, which read thus: "that the assessment of property for taxation in the County of Madison, State of Illinois, for the years 1845, 1846 and 1847, be, and the same are hereby legalized, any neglect or inability on the part of the assessor or assessors of said County to make and return the assessment for either or all of said years within the time required by law, to the contrary notwithstanding." The land in controversy lay in the county of Madison. The court held that this case was distinguishable in no respect from the preceding one, and rendered judgment against the tax title.

An accurate and a pertinent description of the land embraced in the list is essential to its validity. The object of this requirement, is to enable the owner to ascertain from the list itself, that the tax charged against him has been assessed upon his land, and not upon that of a stranger. Besides, the list is the foundation of all of the subsequent proceedings. Each document, wherein the land is designated must necessarily depend upon the list for the accuracy of its description. A false or mistaken description in the list, runs through the warrant to collect, the advertisement, return, certificate and deed. And even when an error is discovered, and corrected in either of the subsequent documents, a defective listing is not cured by the amendment. It follows, that unless a true description is contained in the list, the officer has no guide in advertising, selling and conveying the land; the former owner cannot know that *his* land is in jeopardy, and be able to save it by paying the tax; nor can the purchaser at the

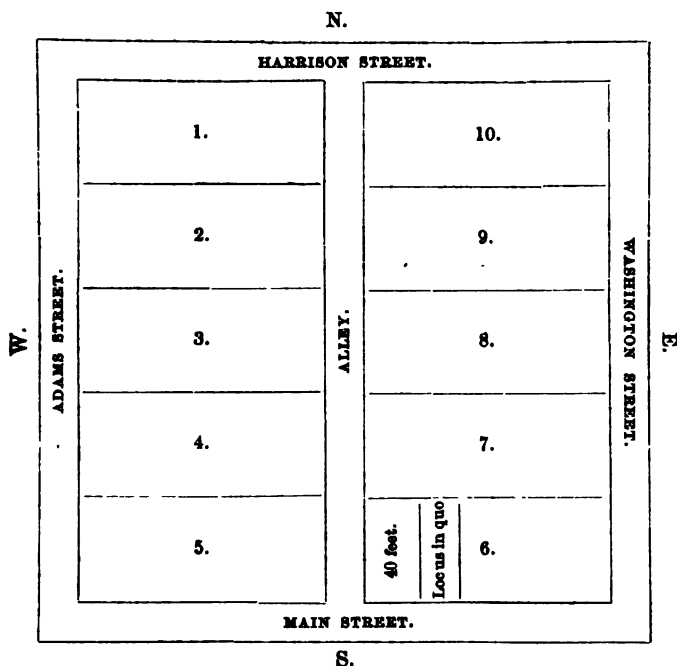
tax sale find and locate the land after his purchase.¹

In the case last cited, the court say: "In an assessment of taxes it is indispensably necessary that the lands should be designated or described in such a manner, as may lead the owners thereof to a knowledge of their being assessed; otherwise it is impossible that they can or ought to be considered as knowing, and therefore delinquent, on account of the non-payment of taxes; since they have no means afforded by the assessors, such as are clearly required by the several acts of assembly on the subject, of knowing or ascertaining *that their lands* are assessed. To deprive them of the right to their lands, by a sale of them for taxes, without their having the requisite means afforded them, of knowing and ascertaining that they have been assessed, would not only be unjust, but iniquitous in the extreme." A description sufficiently certain to convey land between man and man, and which, if contained in an agreement to convey, would authorize a court of equity to decree a specific execution, will not answer in the proceedings to enforce the collection of a tax. In the case of private transactions, the courts, in construing the document, endeavor to collect the intention of the parties, and give that intention effect. If a latent ambiguity exists in the description, parol evidence is resorted to for the purpose of explaining it, and giving to the intention of the parties complete operation; and where the estate intended to be conveyed, is sufficiently described in the deed or other writing, the addition of a circum-

¹ *Brown v. Dinsmore*, 3 N. H. R. 103; *Tallman v. White*, 2 Comstock R. 66; *Douglass v. Dangerfield*, 10 Ohio R. 152; *Turney v. Yeoman*, 16 Ibid. 24; *Currier v. Fowler*, 5 J. J. Mar. 145; *Dunn v. Ralyea*, 6 W. & S. 475.

stance, false or mistaken, will be rejected as surplusage in order to carry that intention into effect. But in these tax proceedings the owner of the estate has nothing to do—he *intends* nothing; the government is acting, through its agents, in hostility to him, and with a view of enforcing the collection of a tax from him. If the officers who undertake to list for him lands lying in one place, for those which lie in another, or have no existence at all, they intend to do what the law under which they profess to act, does not permit.¹ The rule is laid down that a listing is

¹ *Tallman v. White*, 2 Comst. R. 66; *Lessee of Perkins v. Dribble*, 10 Ohio R. 433. The opposite doctrine was asserted in *Blakely v. Bestor*, 13 Illinois R. 708. The list described the *locus in quo* as “20 feet on Main street, by 72 feet deep, commencing 40 feet from the alley, undivided $\frac{1}{2}$ lot 6, block 7, Peoria.” The following plat will show the precise location of the land, according to the decision:



All of the subsequent proceedings omitted the depth of the lot, viz: “by 72

fatally defective and void, if it contain such a falsity in the designation or description of the land listed, *as might probably mislead the owner, and prevent him from ascertaining by the notices, that his land is to be sold or redeemed.* Such a mistake or falsity defeats one of the obvious and just purposes of the law—that of giving the owner an opportunity of preventing the sale by paying the tax.¹ Thus, in the case last cited, the deed and list contained this description of the land in question: “All that certain piece of land situated in the county of Onondago, &c., being what was taxed and returned to the comptroller’s office from the town of Salina, as that part of block twenty-nine, *in the village of Lodi*, which is bounded west by David S. Colvin’s, thence north to lands of Philo D. Mickles & Co., east by lands of Levi Chapman, and south by Foot street.” This was a true description of the lot in all respects, except the name of the village where it lay. There was a tract of land three-fourths of a mile distant, called Lodi, laid off into lots and blocks, but never incorporated as a village, and in fact, annexed to Syracuse; and it was further proved that there was no lot or block in Lodi which answered to the description in the list and deed. The court held the sale void, saying: “In this assessment there was a fatal falsity in describing

feet deep.” The sale was held valid. The court saying: “It is the duty of courts to give effect to the *intent* of parties, if it can be done consistently with the rules of law. In an ordinary deed, when twenty feet of a lot on a particular street is conveyed, it is understood to mean a strip of land twenty feet wide, and running back the whole distance of the lot, be the same more or less. The construction must be the same in a tax deed. The doctrine of strict construction, as applied to the execution of naked statutory powers, has no application to a question like this.” This decision does not appear to be supported by any authority, no reasons are assigned for it, and it is directly in conflict with the cases relied upon in the text.

¹ *Tallman v. White*, 2 Comst. R. 66.

the parcel of land to be taxed. It was described as situate in Lodi, whereas it lay in Syracuse. A land owner exercising ordinary diligence in searching the volume of advertisements, to ascertain whether his lands are to be sold for taxes, or are to be redeemed after sale, looks under the appropriate head, that is to say, under the name of the tract or place where his lands lie, and not elsewhere. He might, therefore, be misled and deceived by such a mistake, as was made in this case; because, for land lying in the village of Syracuse, he would look under that head, and not under that of Lodi. If, instead of looking at the advertisement, the owner, in the present case, had addressed a note to the comptroller's office, inquiring whether block number twenty-nine, in the village of Syracuse, was returned for unpaid taxes, and liable to be sold, he would undoubtedly have received an answer in the negative, because the lot in question would not be found returned and entered in its proper place. It is plain that the misdescription would *probably mislead*, and it is, therefore, fatal to the validity of the assessment." In *Lafferty's Lessee v. Byers*,¹ the land was thus listed:

Name.	No. of Entry.	Original Proprietor.	Original Quantity.	Watercourse	Acres.	Rate.	Tax.
Haines, John	4401	Haines, Jno.	170	Mad River.	78	2	89.22

The court instructed the jury that the description contained in the list was so imperfect, that no valid sale of the land in question, could be made under it. On a motion for a new trial, this ruling was sustained, the court saying: "In this case, the whole original entry was listed by its then owner, Haines, and, per-

¹ 5 Ham. R. 457; S. C., 5 Ohio R. 290.

haps, was sufficiently described by its number and watercourse; but ninety-seven acres had been transferred to another name, leaving seventy-three acres still standing to Haines. What seventy-three acres? In common or separate? If separate, in what part of the lot does it lie? The answers to these questions materially affect the price. Without them no such information is communicated to the public as is calculated to produce a fair competition, and no prudent man will offer its value in his bid. The description, therefore, is not adapted to promote a fair sale, and it must be held insufficient."

In the *Lessee of Massie's Heirs v. Long et al.*,¹ the defendant claimed title to part of out-lot number forty-three, in the town of Chillicothe. The list, in one part, set forth a tax upon "part of out-lot forty-three," in another, "one acre out of out-lot forty-three." The listing was in the name of Edward Long. Parol evidence was offered to show that the "one acre" named in the list, was on the north quarter, where Long resided. The evidence was rejected. The Supreme Court held: 1. That the description was too vague and uncertain; and 2. That parol evidence was inadmissible to locate the land.

In *Treon's Lessee v. Emerick*,² the description in the list, or duplicate, was as follows: "Sixty acres, part of the north half of Section 13, Town. 3, Range 4, &c.," and the sale was held void.

In *Douglass v. Dangerfield*,³ the facts were that Theodoric Bland entered 1333½ acres of land, on part of military warrant number 209, the number of the entry being 1122. It was entered for taxation upon the list, thus:

¹ 2 Ham. R. 287; S. C., 1-4 Ohio Cond. R. 364.

² 6 and 7 Ohio R. 161.

³ 10 Ohio R. 152.

Present Owner.	No. of Entry.	Original Proprietor	Original Quantity.	Watercourse	No. of Acres.	Value including houses	Tax. in 1828, & penalty 1829.	Remarks on the day of sale by the Auditor.
Bland, Theo.	1122	Bland, T.	1333½	Rattlesnake.	485	\$286	D. C. M. 6 28 5	Sold to R. Douglass
Dangerfield, W.	1122	Same.	1333½	Same.	846	\$513	11 25 0	Same.

On the duplicate between these two entries, there were numerous other names. It would seem that after the entry by Bland, he sold 846 acres of the land to Dangerfield, which accounts for the fact that the land was listed in the name of each. The sale was held void. By the court: "In the case before the court, there was an entire survey of 1333½ acres. Of this survey, 485 acres were charged on the duplicate with taxes as the property of Theodoric Bland, and was so advertised for sale. In what part of the tract was this 485 acres located? We are not informed, either by the duplicate, or by the advertisement. It is altogether uncertain. The same remark may be made with respect to the 846 acres, taxed in the name of Dangerfield. The complainants attempt to avoid this difficulty by assuming that this defect is caused by the sale, alleging that as both tracts constitute the whole survey, and as both were sold to one person, there can be no difficulty about the location. If, however, there was error in the duplicate and advertisement, that cannot be cured by a subsequent sale and purchase. The two parcels must have been sold separately, or the sale would be void, and the case must be decided as it would have been had the sales been made to different individuals. This case is like that of *Lafferty v. Byers*, in which the sale was held void, and upon the authority of that case we hold this sale to be void."

In *Perkins v. Dibble*,¹ the land was thus listed:

¹ 10 Ohio R. 433.

Owners.	Range.	Town.	Section.	Lot.	Acres.	Tax.
Jos. Yeomans	8	18	1	8 and 9, north part.	100	\$ 6 48 6

The map in the county auditor's office showed how the land described in the list was located, and was admitted in evidence, subject to objection. The court, after stating that upon the facts there would be no difficulty in finding the land, had it been conveyed by a similar description in a deed, proceed to say: "But although this description might be sufficiently certain in a deed, it does not follow that it is sufficiently certain to maintain a sale for taxes. In order that such sale may be sustained, it is necessary that all the requisitions of the law under which they are made, should have been complied with, and any departure from these requisitions will defeat the sale. Such has been the uniform decision of this court." The law under which this sale was made is the act of February 3, 1835, section ten of which required the assessor to take a list of all taxable property, etc., and for that purpose it was made his duty to visit each house in the county, etc.; and section eleven provided that the list "shall particularly set forth the name of the owner or owners, the number of acres of land in each particular tract, lot, section or subdivision thereof, the range, township, section, quarter section, tract, lot or part thereof, or the number of the entry, location, survey or watercourse, as the nature of the general or particular surveys may require, so as completely to designate or identify the same." The court, in giving to this law a construction, arrived at the conclusion that the listing of the land in controversy was not in conformity to the law, and pronounced judgment accordingly, saying: "The great

object here is to have the lists so made out as to designate and identify the land, and the different modes of division in the different parts of the State referred to, whatever that division may be, whether into entries and surveys, or into townships, sections, quarter sections, tracts or lots; the number of acres in each division or sub-division must be separately and particularly set forth. If the owner of the land does not furnish a list, it is made the duty of the assessor to make it out; and having taken these lists, and having affixed a value to the property, it is his duty to return an abstract of the same to the county auditor. From this abstract returned, the county auditor was to make out a tax duplicate. That there should be no mistake, the thirty-ninth section of the act describes the forms which shall be made use of by the officers, whose duties are prescribed in the act. These forms show that, both in the list and in the duplicate, the precise number of acres in each particular tract, or lot, or part thereof, must be particularly set forth. In the case now before us this was not done; the description is, one hundred acres in the north part of two lots. It does not show the number of acres in each particular lot, and is not in this respect in conformity with the law. No case precisely like the one before us has ever been decided by the court, but adopting the principle by which we have been governed in cases somewhat analogous, we must hold that this tax sale was void, and that the deed made in pursuance thereof conveyed no title."

In *Turney v. Yeoman*,¹ which was a bill in chancery for a partition, the facts were that survey numbered 988, calling for one thousand acres, was patented

¹ 16 Ohio R. 24.

by the United States to Hector McNeal and Joseph and Robert Wilkins, as tenants in common. The plaintiff claimed title to an undivided third of said survey, being the interest of the said McNeal, under and by virtue of a sale thereof for taxes made July 8, 1833. The land was listed for taxation as three hundred and thirty-three acres in the original survey of one thousand, without specifying in what part of the survey it lay. The law under which the sale took place made the deed *prima facie* evidence of the regularity of all the proceedings. The court held the listing void, and that no title passed to the purchaser. Read J., delivered the opinion: "The only question necessary to be considered in this case is, whether the land sold was sufficiently described in the listing for taxation, to pass the title under the sale, &c. It is sought to cure the defective description in the listing, by the description and recitals in the deed, &c. If the description and recitals in the tax deed were of absolute force and could not be contradicted, the complainant would be entitled to the relief sought, under the statute which authorizes the purchaser at tax sales, of an individual interest, to have partition among the tenants in common. But the late decision of this court, which gives effect to tax deeds without other proof to support them, by virtue of the statute which declares they shall be *prima facie* evidence of title, does not prevent said sale from being questioned and set aside, by showing that the requisition of the statute authorizing and prescribing the mode of tax sales, had not been complied with. It merely changes the *onus* of proof. If the description in the listing, then, be not sufficient, it may be shown to destroy

the deed; nor can such defect be cured by the description and recitals in the deed, or other proof. The land listed for taxation must be described with sufficient certainty to point out *what* particular lands, and the description in the deed is *limited* to the description in the listing. Now it might be contended with much reason and force, that it being the duty of the owner to list his land for taxation, he ought not to be permitted to question a tax deed, by showing that he failed to perform his duty, by giving a wrong or vague description. It would have been well in the first instance, perhaps, to have held this doctrine, but the opposite principle has always been observed, and been too frequently asserted to be disturbed, except by legislative interference, which would give it only a prospective effect. The land is not described in the listing as land held in common, not as an undivided interest of 333 acres in the original survey of 1000, but simply as 333 acres somewhere in the original survey of 1000, without specifying in what part of such survey. It is precisely the same as the case of *Lafferty v. Byers*,¹ which was a listing of 73 acres, in a survey of 170. It was held not to be sufficiently certain; and numerous decisions support the same principle, and it never has been otherwise decided. We hold, therefore, that the tax deed is invalid, because the land was not sufficiently listed for taxation."

In *Hannel v. Smith*,² the description was, "30 feet between Chesnut and Elizabeth Streets; value \$210—tax for 1841, \$5.25." By the court: "It is admitted, that according to numerous decisions of this court, heretofore made upon this subject, this

¹ 5 Ham. R. 457.

² 15 Ohio R. 134.

description is defective ; but it is claimed that these decisions are all wrong ; and that this court have been led into error by following the decision of the Supreme Court of the United States, in the case of *Stead's Executors v. Course* ; and the opinion of Judge Marshall, in that case, has been commented on with no little severity. It may be that the counsel is right, and that the Supreme Court of the United States, and this court, are all wrong. But we generally feel that we are pretty well fortified, if our decisions are sustained by the authority of the highest court in the Union, &c. But aside from the decisions of this court, is the description of the land, as entered upon the duplicate, sufficient ? The law requires 'a pertinent description of the property so as to identify the same.' The number of the lot is not given. It is not stated whether it is an entire lot, or a part of the lot. It does not appear whether it is 30 feet front, or 30 feet square. And if 30 feet front, it is not stated upon what street it fronts. There is in fact, nothing in the description by which the land can be identified."

In *Richardson v. State*,¹ which was a suit for taxes, under a statute requiring the intervention of judicial proceedings in the collection of taxes, the list described the land as "56 acres in the southeast quarter of Section 8, Township 12, Range 13 ;" and the description was held too imperfect to authorize a judgment against the land.

In *Currie v. Fowler*,² which was an ejectment by the appellee against the appellant, the former claimed under a tax deed. The law required that the list should mention the *water-course* upon which the land

¹ 5 Blackford R. 51.

² 5 J. J. Marshall R. 145.

was situated. The land in question was entered as lying upon the waters of "Big Boone," while the list described it as lying upon the borders of "Bank Lick." The court held the sale void. "The design of the law in requiring the owners of the land to state the water-course upon which it was situated, in his list of taxable property, was two-fold: 1. To identify the tract, and to enable the sheriff in his advertisement to describe it accurately, if it became necessary to sell it. 2. To enable those who might be disposed to purchase, to find it by the description, ascertain its value, and regulate their bids accordingly. The sheriff advertised and sold 5,000 acres on Bank Lick, and gave his certificate accordingly. When the surveyor, thereafter surveyed "Big Boone," and the sheriff afterwards conveyed the land thus surveyed, they departed from the law, and so far their acts conveyed no title. We know of no precedent for getting over a variance in the water-course, and we are not disposed to make one. Bidders and purchasers have no right to complain, when they purchase land upon one stream, that they must find it there, or not get it at all. We are not disposed to help them out in their speculations, although we will give them full justice by presuming that all was right, until the contrary appears. If in the present case, the sheriff had advertised land for sale, as being land lying on Big Boone, persons might for anything known to us, have attended the sale, and paid the taxes for half the quantity claimed by Fowler. It was the sheriff's duty to advertise, however, in pursuance of the auditor's transcript, and to sell accordingly; the error consists in going to a different quarter of the country afterwards, to hunt the land."

In *Brown v. Dinsmore*,¹ the statute provided "that the selectmen, etc., shall make out in writing under their hands, and deliver the same to the several collectors, etc., a list of all such assessments, and insert therein the name of the owner, if known, otherwise the name of the original proprietor, and the number of acres taxed, and the number of the lot and range; and the proportion of each assessment to each lot or tract of land taxed, shall be set against said lot or tract of land in the list aforesaid; and if any building of a non-resident shall be taxed, the number of the lot, or other description of the land whereon it stands, shall be mentioned in said list. And if the name of the owner and the original proprietor of any land be unknown, the quantity of land, the number of the range and lot, if lotted, otherwise such description of the land taxed as it is usually known by, being inserted in said list, shall be a sufficient description of said land." The land in controversy lay in Chestor, the former owner resided in Londonderry, and was inserted in the list as a non-resident proprietor, but his land was not described in the list. It was contended by those who argued against the validity of the tax sale, that where the owner is known, the statute requires no description of the land taxed; that it is only in cases where the owner is unknown that the number of the lot and range, or some description of the land, is required to be inserted. The other side contended that not only the name of the owner, or original proprietor, if known, must be inserted, but also the number of acres taxed, and the number of the range and lot. The court, in deciding the question, say that "such is the language of the

¹ 3 N. H. R. 103.

statute *that it may be construed either way*," and conclude that the name of the owner *and* a description of the land was the true construction, and the list was held void because the range and lot was not set forth.

In *Ainsworth v. Dean*,¹ the listing and subsequent proceedings were held void; the facts of the case, the statute, and reasoning of the court sufficiently appear in the following extract from the opinion delivered in the cause: "It is defective because neither the number of the lot, nor of the range is inserted, though it appears that the land was lotted. The land is described as '*sixty-eight acres, part of the Governor's right.*' This description is altogether too indefinite. The statute provides that the description must be such '*as the land may readily be known by,*' and this description does not answer such a requirement."

In the *Bank of Utica v. Mersereau*,² there was a sale of 800 acres of land, to be laid out in a square form, as nearly as might be, in the northwest corner of 2401 acres, in township one, assessed to John Garrettson, and described in the assessment list as "bounded on the south by Joshua Mersereau and others, west by the town line, north by Rathborn and the town line, and east by the Tioga river." There was no proof that Rathborn ever owned any land in the township, according to the call in the list and deed, and the description was held void for uncertainty.

Under the curative act of Pennsylvania, which declares that "no irregularity in the assessment" shall invalidate the sale, it has been held that an *imperfect* description, but one *calculated* to inform the owner that his land has been assessed, will be regarded

¹ 1 Foster R. 400.

² 3 Barbour C. R. 528.

as sufficient.¹ And in *Williston v. Colkett*,² a tract of land described in a warrant as containing 999 acres, and which was originally assessed to the warrantee, and described by the number of the warrant, the name of the warrantee, and the number of acres, was reduced in quantity by a sale to 600 acres. Mann, who was the purchaser from the warrantee, neglected to list his portion of the tract; the assessor inserted it in the list as *unseated* land, and described it as containing 200 acres, and Mann recognized this listing by paying taxes upon his portion for two years; and the court held, that as he had neglected to list the land, and had taken advantage of the mistake in the quantity for two years, the defect must be regarded as cured by the statute. Where in the description, initial letters, abbreviations and figures were used, thus: "E. $\frac{1}{2}$ S. W. $\frac{1}{2}$, section 24, town 3, south of range 7 west, 80 acres, etc.," the proceeding was held regular.³

The validity of the listing oftentimes depends upon the character of the land. Each State being governed by its own peculiar local policy, lands are divided into classes, a legal character is assigned to each, and the assessors are directed to list them accordingly. Sometimes a particular class is exempt from sale, and the tax made a charge upon the person or goods of the owner. It may be laid down as a general rule, that wherever a confusion of these different classes takes place, and the requirements of the statute are disregarded by the officers charged with the duty of listing the land, the proceeding will be held illegal and void.

¹ *Strunch v. Shoemaker*, 1 Watts & Serg. R. 175; *Michew v. McCoy*, 7 Ibid. 390; *Dunden v. Snodgrass*, 18 Pa. State R. 151.

² 9 Barr R. 38.

³ *Sibley v. Smith*, 2 Gibbs Mich. R. 503.

In Pennsylvania, lands are divided into two classes for the purposes of taxation—seated and unseated—in other words, vacant and occupied lands. These are never blended together, but separate lists are required. Lands which are occupied are placed upon the seated lists; those which are vacant are listed as unseated. No change can be made of the land from one list to the other, without the joint act of the owner and the county commissioners and assessors. No lands can be sold unless they are unseated in point of fact, and regularly listed as such. The remedy of the State for taxes due upon the seated list, is against the occupant alone. No lien exists upon the land itself, and where no personal property of the owner or occupant can be found, the tax is lost. In such cases the assessor has no authority to list the land, the collector has no power to sell it, and the purchaser is chargeable with notice of the fact that the land is occupied, and purchases at his peril.¹ The policy of this system of taxation is thus explained in *Burd v. Ramsay*:² “The selling of lands for the trifling amount of taxes usually due upon them, is always attended with inconvenience and vexation to the owners, who are often involved in trouble and expense by the sheer neglect of the collectors, who seldom make a personal demand. This, and not the amount to be paid, has been the cause of the repugnance constantly evinced to acts of Congress laying a land tax, which have always contained a provision for the sale of the land itself.

¹ *Young v. Martin*, 2 Yeates R. 312; *Owens v. Vanhook*, 3 Watts R. 260; *Patterson v. Blackmore*, 9 Watts R. 104; *Commissioners v. Smith*, 10 Ibid. 391; *McKee v. Lamberton*, 2 Watts & Serg. R. 107; *Hockenbury v. Snyder*, Ibid. 240; *Cranmer v. Hull*, 4 Watts & Serg. R. 36; *Larimer v. McCall*, Ibid. 133; *Smith v. McGrew*, Ibid. 338.

² 9 S. & R. 109.

Our State legislature, on the contrary, have ever been guided by the wise policy of not looking to the land in that class of cases which necessarily afford a reasonable probability of obtaining the tax from the person or chattels of the owner. They seem to have supposed that on every tract of land in actual occupancy, sufficient personal property would be found to satisfy the demand, by distress, &c." A tract of land ceases to become unseated as soon as it is occupied with a view to permanent use, and that occupancy may be said to commence with the moment of entry for the purpose of clearing the land.¹ As soon as a person enters upon an unseated tract of land, whether under title, claim of title, as a tenant of the owner, or an intruder, and becomes a resident upon it, or without becoming a resident, improves and occupies it in such a way as to furnish upon the land the means of making and levying the taxes by distress, it must be considered in law as seated, and no longer liable to be assessed with taxes, and sold for them if they remain unpaid. The officers need not inquire, nor are they bound to know, by what authority he has entered upon and taken possession of the land.² Residence without cultivation, or cultivation without residence, or both combined, will constitute a seating of the land;³ and where the land is actually possessed by residence thereon, it cannot be sold for taxes, whether the occupier has personalty sufficient to pay the tax or not.⁴ One in possession of a portion of a tract of land, having

¹ *Wallace v. Scott*, 7 Watts R. 248; *Milliken v. Benedict*, 8 Barr R. 169.

² *Campbell v. Wilson*, 1 Watts R. 503; *Larimer v. McCall*, 4 Watts & Serg. R. 133; S. C., *Ibid.* 351.

³ *Kennedy v. Daily*, 6 Watts R. 269; *Wilson v. Watterson*, 4 Barr R. 214.

⁴ *Campbell v. Wilson*, 1 Watts R. 503.

title, or claiming title to the whole, is, in judgment of law, an occupant of the entire tract, and the vacant portions of it cannot be listed and sold as unseated;¹ and the quantity occupied is immaterial, so that the intent is manifest to take and hold possession of the entire tract.² But where one, with or without color of title, takes possession of unseated lands belonging to another, and designates the extent of his claim, or the portion he means to occupy, by lines marked upon the ground, and confines himself within such lines, his possession will not be taken to extend beyond such lines, so as to give the character of seated to the rest of the tract.³ An accidental or temporary suspension of the actual occupancy of land, does not authorize a sale of it as *unseated*. The occupant may abandon his claim, and thus discharge his person and personal property from liability for the tax. But it must be evinced by acts which leave no doubt of his intention; in other words, it must be an entire and total abandonment of his claim, and not a mere suspension of his possession,—no *animus revertendi* must exist in the mind of the occupant.⁴ The owner of the claim, or occupant, cannot abandon the possession of a part of an entire tract, which was, prior to the time of the alleged abandonment, regarded and listed as seated land: to constitute any portion of it unseated, and authorize its transfer to that list, there

¹ *Campbell v. Wilson*, 1 Watts R. 503; *Larimer v. McCall*, 4 Watts & Serg. R. 133, 351; *Ellis v. Hall*, 18 Pa. State R. 292; *Mitchell v. Bratton*, 5 Watts & Serg. R. 451.

² *Ellis v. Hall*, 18 Pa. State R. 292.

³ *Mitchell v. Bratton*, 5 Watts & Serg. R. 451.

⁴ *Harteson v. Jack*, 2 Watts R. 124; *McKibbin v. Charlton*, 14 Pa. State R. 128; *Sheaffer v. M'Kabe*, 2 Watts R. 421; *Fish v. Brown*, 5 Ibid. 441; *Millican v. Bennett*, 8 Barr R. 169; *Keating v. Williams*, 5 Watts R. 382; *Kennedy v. Daily*, 6 Ibid. 269.

must be an abandonment of the entire tract.¹ It is presumed, however, that where there is a claim to an entire parcel, and the occupant is in possession of only a portion, and he abandons that occupancy, the whole claim becomes unseated. The point has not been decided, but as a partial occupancy, under claim of title to the whole, gives a constructive possession to all, the reasonable inference is, that when he abandons the actual possession, the constructive possession based upon it, goes along with it. Where the facts are admitted, or clearly proved, the question whether there has been an abandonment, is one of law; where the facts are disputed or doubtful, it is a question of fact, exclusively within the province of a jury, under the direction of the court as in other cases.² The cases are uniform as to the consequences of an abandonment. It discharges the owner and his personalty from liability, renders the land unseated, creates a lien upon it for the tax, which can only be enforced by a sale of the land itself.³ Where the owner of a parcel of seated land, in clearing and improving, encroached upon an adjoining unseated proprietor a few feet or yards, it was held that the encroachment would not deprive the latter of its legal character, as unseated; but the court intimated an opinion that an encroachment of several acres would.⁴ It would seem to be simply a question as to the intention of the intruder; if he entered upon the adjoining tract

¹ *Patterson v. Blackmore*, 9 Watts R. 104.

² *Wilson v. Watterson*, 4 Barr R. 214; *Gibson v. Robbins*, 9 Watts R. 156; *Forster v. M'Divitt*, 5 W. & S. 359.

³ *Harbeson v. Jack*, 2 Watts R. 124; *McKibbin v. Charlton*, 14 Pa. State R. 128; *Sheaffer v. M'Kabe*, 2 Watts R. 421; *Fish v. Brown*, 5 Ibid. 441; *Gibson v. Robbins*, 9 Watts R. 156; *Forster v. M'Divitt*, 5 Watts & Serg. R. 359; *Wilson v. Watterson*, 4 Barr R. 221; *Kennedy v. Daily*, 6 Watts R. 273.

⁴ *Fish v. Brown*, 5 Watts R. 441; *Campbell v. Wilson*, 1 Watts R. 503.

for the purpose of acquiring a right in hostility to the owner, he would become seated upon the land; if he encroached under a mistaken belief as to the extent of his boundaries, his entry could not give character to the land encroached upon, as *seated*.¹ It is evident that the quantity occupied is immaterial, where the intention is manifest to take possession of the entire tract.² Where one is possessed of a part, claiming title to the whole, and the tract is divided afterwards by the organization of a new county, and the vacant part of the tract is in the new county, this does not change the character of the land as seated.³ Where the original tract contains four hundred acres, a portion of which is occupied and listed as seated lands, and afterwards the owner sells one hundred acres of the tract, over which his occupancy did not extend, the portion sold loses its character of *seated* land.⁴ But where an unseated tract descends to several heirs, and some of them sell and convey their undivided interest in the land to a stranger, who enters and occupies, the whole of the tract will be regarded as unseated.⁵ The question whether lands are seated or unseated, is a question of fact for a jury.⁶ Where the land is unseated at the time of the assessment, but becomes seated before a sale takes place, a sale of it as unseated will be sustained.⁷ Where unseated land is assessed upon the seated list, it cannot be sold.⁸ And where the land is cultivated, it cannot be assessed as unseated, though

¹ See *Foster v. M'Diuit*, 5 W. & S. 359.

² *Ellis v. Hall*, 18 Pa. State R. 292. ³ *Ellis v. Hall*, 18 Pa. State R. 292.

⁴ *Campbell v. Wilson*, 1 Watts R. 503. ⁵ *Erwin v. Helm*, 13 S. & R. 151.

⁶ *Rosenberger v. Schull*, 7 Watts R. 390.

⁷ *Robinson v. Williams*, 6 Watts R. 281; *Murray v. Guilford*, 8 Ibid. 548.

⁸ *Milliken v. Benedict*, 8 Barr R. 169.

the owner does not reside on it. And the assessor is not authorized to return it as such, if there be marks of cultivation without residence, which puts him upon inquiry; without the clearest signs of abandonment.¹ So, if a tract of land which is, in point of fact, unseated, be assessed as seated land, with the knowledge and assent of the owner, and the commissioners of the county, it must be taken as seated so far as regards the assessment and collection of the taxes; and a sale of it for taxes, as unseated, would be void. Land which is, in fact, unseated, and which has been assessed with the knowledge and consent of the owner, and the commissioners of the county, may, whenever it suits the interests or convenience of the county, upon giving reasonable notice to the owner, be transferred from the seated to the unseated list; but the assessor has no right to transfer to the unseated list without reasonable notice to the owner, and if he do so, a sale of it for taxes will be void.²

The same rule of strictness, in relation to the listing of lands according to the legal character assigned to them by law, is adopted by the courts in Maine, and it is held that unless they are listed in conformity with the law, the sale is void. Thus in *Barker v. Hesseltine*,³ where the law required "unimproved lands of non-resident proprietors" to be assessed accordingly, and the land in question was listed as the property of "a non-resident proprietor *unknown*," but in point of fact, belonged to a resident of the town where the property was situate, and the deed under which he claimed title was duly recorded before the assessment was made; the court held the listing and

¹ *Wilson v. Watterson*, 4 Barr R. 214.

² *Milliken v. Benedict*, 8 Barr R. 169.

³ 27 Maine R. 354.

sale void. Other cases in the same court reiterate the principle.¹ The same doctrine is conceded by the Supreme Court of Illinois in the construction of the statute of 1829, which subjected the land of non-residents *only*, to assessment and sale; holding that where the land listed belonged to residents of the State, all of the proceedings are void.² So in Maine, where land belonging to a resident was assessed as non-resident land, the assessment was held void.³ A similar decision was made in Massachusetts.⁴

In many of the States, the statutes require the land to be listed in the name of the owner or occupant of the land; in others, the law only directs the name of the owner to be inserted, *when known*. The spirit of this requirement is to give to the owner additional means in the examination of the tax list, to ascertain whether his land has been assessed; the law presuming that every sane person will remember his name, if he is unable to distinguish his land by the description contained in the list. In Louisiana, where the statute required the name of the owner to be inserted, and the list stated that he was "*unknown*," it was held defective and void.⁵ Under a similar statute in New York, it was held that where the land was described in the list as belonging to "the widow and heirs of A. B., deceased," this was a sufficient compliance. So the use of the firm name, where the land was owned by partners. But in the same case the court said, that where the land belonged to a single individual, it was proper and necessary that

¹ 9 Shepley R. 402; 11 Ibid. 283, 386.

² *Messenger v. Germain*, 1 Gilm. R. 631.

³ *Lunt v. Wormell*, 19 Maine R. 100.

⁴ *Rising v. Granger*, 1 Mass. R. 48.

⁵ *Carmichael v. Aiken*, 13 Lou. R. 205.

the name of that individual should be inserted in the list.¹ In *Combs v. Warren*,² which was a writ of entry, the demandant claimed under a mortgage, and the tenant under a tax title. The statute required the land to be listed in the name of the "owner or possessor." The land in question was listed in the name of the demandant, a mortgagee of the premises, who never was in possession. The court held that the mortgagor was the *owner*, and that as the property was not listed in his name, the proceedings were void. The Virginia statute required the commissioners of taxes to "take an account, in writing, of the quantity of land belonging to all persons within their counties, and *also the name of the proprietor or proprietors* thereof, and ascertain the value of the same." In a case where the land was listed in the name of the widow of an intestate, instead of the heir, the list was held void.³ So, where the statute of Massachusetts directed an assessment in the name of the "occupant or tenant," and it was listed in the name of the landlord, the list was held void.⁴ It was also held by the Court of Appeals in Kentucky, in construing the act of Congress levying a direct tax, that an assessment in the name of a person in possession under a parol contract, instead of the rightful proprietor, was void.⁵ In *Alword v. Collin*,⁶ under the peculiar phraseology of the statute, it was held that a listing of unimproved lands, belonging to a non-resident proprietor, in which he was wrongly designated, was valid, whereas, in the listing of improved lands belonging to residents, the defect

¹ *Wheeler v. Anthony*, 10 Wend. R. 346.

² 34 Maine R. 89.

³ *Yuncey v. Hopkins*, 1 Munf. R. 419.

⁴ *Martin v. Mansfield*, 3 Mass. R. 419.

⁵ *Johnson v. M'Intire*, 1 Bibb R. 295.

⁶ 20 Pick. R. 418.

would have been fatal. The decision was placed upon the ground, that in the former instance the tax was a charge upon the land itself, while in the latter, it was simply a charge upon the person and goods of the delinquent.

In those cases where the statute requires the assessor to list the lands in the names of the owners respectively, if known, the principle to be deduced from the authorities is, that it is the duty of the assessors to ascertain the true name; that if they omit the name in the list, or state that the owner is unknown, the presumption is that the officer did his duty, and that the owner was in point of fact unknown; but where it is shown that the name of the original owner was known to the officer, the list will be held invalid, because the statutes expressly declare that the name of the owner shall be inserted when it can be done.¹ Where an entire tract of land is assessed to one who owns only a portion of it, the listing is illegal. Thus in *Barker v. Blake*,² it appeared that one Treat, in the year 1831, was the owner of lot 10, Sumner street, Bangor; that in April, 1832, he conveyed four feet of the south side of the lot to one Baldwin, and a division fence was thereupon erected between them, and this fence was kept up afterwards; that in September, 1832, Treat conveyed the residue of the land to one Taylor; that in 1836 the title of Taylor, by mesne conveyance, became vested in Barker; the whole lot was assessed to Barker, and the assessment was held void. By the court: "It is quite clear that the assessors had no right to

¹ *The Proprietors of Cardigan v. Page*, 6 N. H. R. 182; *Nelson v. Pierce*, Ibid. 194; *Ainsworth v. Dean*, 1 Foster R. 400; *Brown v. Veazie*, 25 Maine R. 359; *Merritt v. Thompson*, 13 Illinois R. 716; *Shimin v. Inman*, 26 Maine R. 228.

² 36 Maine R. 433.

assess to him his neighbor's land, jointly with that which he owned in severalty, and such assessment, and the collector's sale and deed in pursuance of them, were utterly void."

Where one owns several tracts or parcels of land, they must be listed and valued separately, else the proceedings will be void. Thus in *Shimin v. Inman*,¹ the statute required the assessors to set forth in their lists "the number of acres of unimproved land which they may have taxed on each non-resident proprietor of lands, and the value at which they have estimated the same." The lots in controversy were thus listed:

Name of Owner.	No. of lots.	Range or Division.	No. acres.	Value.	State & County Tax.	Town Tax.	Total.
Wm. Shimin, or Unknown.	16 17 18	On Penob- scot River.	240	\$240	\$ c. 61	3 22	3 83

The court held the list illegal, saying: "A fair construction of the statute requires that each lot should be valued and assessed separately. The lots may be owned by different persons; and if a joint valuation and assessment were allowed, one owner could not ascertain the amount of tax on his own land, or pay it, or redeem the land when sold, without paying the tax on all the other lands assessed with it. Although, in this case, the several lots appear to have been owned by one person, that fact cannot dispense with the law, or excuse a deviation from it." And in *Wiley v. Scoville's Lessee*,² the land was thus listed, taxed, advertised and sold:

CLEVELAND TEN ACRE LOTS.

Owner's Name.	Range.	Town.	Lots.	Acres and Rate.	Tax.
Unknown heirs.	12	7	{ 33 34 35 } { 38 39 40 } { 41 42 43 }	Second Rate. 90	\$ c m 4 83 5

¹ 26 Maine R. 228.² 9 Ohio R. 43.

Grimke, J. "The proceedings in this case show a defect which is very common in tax sales. Lot 32 (the one in controversy,) was listed and advertised for sale, with eight others of the same ten acre lots, by the following description; the first and second columns contain the range and township, the third enumerates the nine lots by their number, and the fifth contains an apportionment in gross of the tax for which they were delinquent. The law requires that the auditor should so list and advertise the land as to furnish the owner with a description of the land subject to taxation, and that the sale shall be advertised and conducted in conformity with that rule. In this instance there was an assessment in gross of the whole amount of the tax chargeable upon the nine lots, and yet each lot was put up and sold to pay the tax on it separately. The land is not treated as an entire tract in the list, advertisement or sale, but is so treated in the apportionment of the tax. Now it is evident that the course pursued should be consistent with itself. If the lots might be treated as separate and distinct parcels of land, then the tax charged upon them should have corresponded with the fact in the description; or, if they should be treated as one entire tract, then, although the assessment of the tax in the advertisement as one aggregate sum would have been correct, the description of the land would itself be erroneous, and so also would the sale under it. In either case the title is defective, and the court were right in ruling out the evidence."

The statute of Illinois provides that each tract of land shall be listed, valued and assessed separately. This does not mean that an entire tract must be subdivided into the smallest legal subdivisions of which

it is susceptible, but simply that two or more tracts disconnected from each other, so as not to be embraced within the same general description, shall not be assessed together. Thus "the S. $\frac{1}{2}$ Sec. 5, T. 3 N., R. 4 W.,"¹ and "S. W. and S. E. Sec. 9, T. 8 N., R. 8 E.,"² were held respectively to be a compliance with the statute.

Lastly, to make a complete and perfect list, the land must be valued in the manner and upon the principles prescribed by law. It has already been shown that where the law required the lister to join with him two householders in making the valuation, which he neglected to do, the proceeding was held void.³ All fixed and permanent improvements upon the land, which constitute in judgment of law a part of the freehold, must be valued with the land, or the valuation will be void.⁴ The constitution of Illinois provided that the mode of levying a tax should be by valuation, so that every person should pay a tax in proportion to the value of his property. The revenue law of February 19, 1827, provides that lands "are hereby declared subject to taxation, and for that purpose are hereby divided into classes, valued and taxed as follows: Lands of the first quality shall compose the first class, shall be valued at four dollars, and taxed at the rate of two cents per acre; lands of the second quality shall compose the second class, shall be valued at three dollars, and taxed at the rate of one and a half cents per acre; lands of the third quality shall compose the third class, shall be valued at two dollars, and taxed at the rate of

¹ *Atkins v. Hinman*, 2 Gilm. R. 443.

² *Spellman v. Curtenius*, 12 Ill. R. 410.

³ *Kinney v. Doe*, 8 Blackford R. 350.

⁴ *Fitch v. Pinckard*, 4 Scam. R. 69.

one cent per acre." This statute further provided that the owner or his agent should list his land in the class to which it belonged, in the auditor's office, accompanied by an affidavit that the list contained a true classification; one listing only was required, and the auditor was authorized to charge the tax annually upon such classification, till the owner furnished a new list. If the owner failed to list, the auditor was authorized to do so. It will be perceived that this valuation was an arbitrary one. Improved land worth twenty dollars an acre could be valued no higher than four dollars, and taxed at the rate of two cents per acre, while lands of a merely nominal value were assessed at the rate of one cent per acre. The constitutionality of this law was maintained by the Supreme Court of Illinois upon the ground of necessity, expediency, and cotemporaneous construction, all of which were doubtful and dangerous reasons to assign in favor of the validity of a legislative valuation of land for the purposes of taxation.¹ If such a principle is adhered to, there is an end of equality and uniformity in the operation of the taxing power under our constitutions, except so far as representative responsibility may secure them.² The law which

¹ *Rhinehart v. Schuyler*, 2 Gilm. R. 473; *Bruce v. Schuyler*, 4 Ibid. 221.

² The legislature of Maryland imposed a tax of a specific sum upon each county in the State, without basing the assessment upon any actual valuation of taxable property. The constitutionality of this law was questioned, but the Supreme Court of that State held that before such a law could be pronounced unconstitutional, it must appear clearly that the persons taxable were not made to contribute according to their actual worth in real and personal property; that in the absence of evidence they would presume that the tax was laid according to the provisions of the constitution, and that the legislature divided the tax among the counties according to the valuation of property in such local jurisdiction, and had such evidence before them as guided their judgment in that particular. (*Waters v. State*, 1 Gill. R. 302.) The constitution of Florida required "the General Assembly to devise and adopt a system of revenue, having regard to an equal and uniform mode of taxation, to be general through-

authorized this classification and the amendments thereto, made the deed *prima facie* evidence of title, or at least the courts so held.¹ Upon the strength of these cases, affirming the constitutionality of the law of 1827, and that the deed was *prima facie* evidence of title, numerous recoveries were had in the courts of Illinois, upon deeds acquired under that and similar laws; at length efforts were made to prove that the lands sold under those laws had never been listed for taxation in conformity with the legislative classification or valuation. The first attempt was made in *Graves v. Bruen*.² The defendant in error relied upon a tax deed made in pursuance of a sale for the taxes of 1832. The plaintiff in error offered in evidence the deposition of the auditor for the time being, with a diagram of the listing attached as a part thereof, of which the following is a copy:

"Lands lying between the Illinois and Mississippi Rivers, patented by the United States to individuals, for their military services, and taxed by the State of Illinois."

Abstract.	Acres.	Patentees.	Present Owners.	Quarter.	Sec. Town. Range.	1828	1829	1830	1831	1832	1833	1834	1835	1836
		R. L. J. Austin	M. Bruen.	N. E.	18 1 S. 7 W.	160	171	171	249	263	Adams.	Hancock.	Adams.	Adams.

The auditor deposed that the land in question was listed in the manner shown in the diagram, for the

out the State." Under this clause the legislature passed an act dividing the land into three classes, and required the owner to list it in the class to which it belonged, and the law was held constitutional. (*Levy v. Smith*, 4 Fla. R. 154.)

¹ *Mazy v. Clabaugh*, 1 Gilm. R. 26; *Vance v. Schuyler*, Ibid. 160; *Graves v. Bruen*, Ibid. 167; *Messenger v. Germain*, Ibid. 631; *Thompson v. Schuyler*, 2 Ibid. 271; *Rhinehart v. Schuyler*, Ibid. 473; *Bruce v. Schuyler*, 4 Ibid. 221; *Job v. Tebbetts*, 5 Ibid. 376; *Irving v. Brownell*, 11 Ill. R. 402.

² 1 Gilm. R. 167.

year 1832, and that there was no other evidence of its having been listed in any other manner; that it did not appear whether it was listed by the owner or auditor; that there was no distinction made in the diagram between the lands of residents and non-residents; that it was his belief that the land in question was listed in the second class. E. H. Buckley, Esq., was called as a witness for the plaintiff in error, for the purpose of explaining the diagram, who deposed that the diagram was correctly copied from a large book shown to him by the auditor, as a tax book for the Illinois Military Bounty Land District; that the caption was correctly copied from the first page of the book; that the heading of the columns, and entries opposite said tract of land, were copied from the page on which the land was entered, and which was many pages from the first; that there was no heading to the fifth column of the diagram, on the page from which he copied it; that he was not certain that there was none at the commencement of the book, but thought there was not. It will be perceived, on examination of the diagram, that the quantity, quality, or class of the land, does not appear, and that the rate of taxation is not uniform, so that the valuation is nowhere ascertained by inspection of the list, even by inference. This evidence was rejected by the court below, and the judgment affirmed in the Supreme Court. Scates, J. "Although the diagram shows that some of the columns are blank, yet *non constat*, but the proper heading would be found in all cases by tracing the columns back to the first heading. The entries of dates, numbers, quantity, &c., are not necessarily repeated. The blank in the column refers back to

the first entry, and the loose and indefinite proof offered, being calculated to mislead the jury, was properly rejected by the court." A more successful attempt was made to overthrow the deed in *Job v. Tibbets*.¹ There, a deposition of the auditor was offered, and rejected by the Circuit Court, which purported to contain all the information appearing upon the files and records of his office, and the columns were traced back to the first page, and the class, quantity, or value, nowhere appeared. The Supreme Court reversed the judgment, holding that the deposition was competent. TREAT, C. J. "Whether it (the deposition,) established what the defendant sought to prove, we do not undertake to say, but in our opinion, the proof was pertinent to the point in issue, and should not have been excluded from the jury. The case of *Graves v. Bruen*, although an extreme case, is not in point. There the deposition was partial and incomplete in its statement of facts, and did not pretend or purport to contain all of the evidence in the office, relative to the matter in question. Here the auditor assumes to give all the information in his office concerning the matter in issue, and there is nothing on the face of the deposition, or in the case, to show that anything material is withheld. If it does not, in fact, furnish all the evidence in the office, the deficiency can be supplied in another deposition, or by transcripts of the record."

In *Graves v. Bruen*,² which came before the court a second time upon additional evidence, which explained the fifth column, and showed that no other listing of the land had ever been made, and gave all of the evidence to be had upon the question, in the

¹ 5 Gilm. R. 376.

² 11 Ill. R. 431.

auditor's office, the court held: 1. That the listing and valuation was a prerequisite which must exist. 2. That the evidence showed no classification of the land, and is sufficient to rebut the *prima facie* character of the deed. The same principles, upon a similar state of facts, were reaffirmed by the court in *Schuyler v. Hull*:¹ and the case of *Job v. Tibbetts*,² having been remanded for a new trial, upon similar evidence, and the jury having found against the tax title, Tibbetts prosecuted an appeal, but the Supreme Court sustained the verdict.³ These decisions made void every tax title in Illinois, from the formation of the State government down to and inclusive of the year 1838. It may be laid down as a general rule, that a valuation being essential, the statute must be strictly pursued in making and returning it, or the proceedings based upon it will be illegal and void.⁴ Usage can in no case justify a departure from the requirements of the law in this respect, where they are plain and unambiguous.⁵ The assessment of a tax by one corporate body, based upon a valuation made under the authority of another, is unauthorized and void.⁶

¹ 11 Ill. R. 462.

² 5 Gilm. R. 376.

³ 11 Ill. R. 453.

⁴ *Thurston v. Little*, 3 Mass. R. 429; *Thayer v. Stearns et al.*, 1 Pick. R. 482.

⁵ *Thurston v. Little*, 3 Mass. R. 429.

⁶ *Granger v. Parsons*, 2 Pick. R. 392.

CHAPTER VI.

OF THE LEVY OF THE TAX.

The levy of a specific sum of money, upon each tract of land embraced in the list, by the proper authority, is another essential link in the chain of a tax title, without which the purchaser acquires no rights whatever. By this assessment the amount which every citizen is bound to pay for the public benefit is definitely fixed; and to it he is compelled to resort, for the purpose of ascertaining how much money he must pay to that public, as his share of a common burden, and thus prevent a sale of his property. It is the authority upon which the collector proceeds to demand and enforce the collection of the tax—he has no other means of ascertaining the sum assessed against an estate—and in this respect it may be regarded as analogous to an execution, issuing upon a judgment. It is the guide of the owner and officer in redeeming the land after the sale. Again, it is evident that the tax must be due and unpaid, in order to authorize a sale of the land upon which it was assessed. This can only be shown by proof that the land was not only listed and valued, but that the tax charged against it for the current year was in fact levied by competent authority, and in the time

and manner prescribed by law. When such evidence is produced, the presumption is that the tax thus levied is unpaid, upon the same principle that a promissory note is evidence of a continuing debt, until its extinguishment by payment is established.¹

The *onus probandi* is upon the party claiming under the sale.² Nor is there any difficulty in making proof of this fact, if it ever existed. The state tax is fixed by a public statute; the list will show the valuation of the land, and by computing the per centage of tax fixed by the law upon that valuation, it can be seen in an instant whether the tax is a legal one or not. When the tax is levied by a county, city, town or other corporation, a record is invariably required to be made of the order; and the books themselves, or certified or sworn copies thereof, are admissible in evidence, and upon an inspection of the list, and a comparison of it with the law and the order, the legality or illegality of the tax will appear.³

The tax, of course, must be levied by the tribunal or persons to whom the power is delegated. And it is held in New Hampshire that the levy of a tax, at a town meeting not legally warned, is illegal and

¹ *Penland v. Stewart*, 4 Dev. & Bat. R. 386; *Reeves v. Towles*, 10 Louisiana R. 276; *Baker v. Towles*, 11 Ibid. 432; *Carmichael v. Aiken*, 13 Ibid. 205; *Nancarrow v. Weathersbee*, 6 Martin's Lou. R. 347; *Winchester v. Cain*, 1 Robinson's Lou. R. 421; *Nalle v. Fenwick*, 4 Randolph R. 591-4; *Lessee of Holt's heirs v. Hemphill*, 3 Hammond R. 232; S. C., 1-4 Ohio Cond. R. 551; *Lessee of Dresback v. McArthur*, 6 and 7 Ohio R. 307; *Garrett v. White*, 3 Iredell Eq. R. 131; *Smith v. Corcoran*, 7 Lou. R. 46; *Bratton v. Mitchell*, 1 Watts & Serg. R. 310; *Conrad v. Darden*, 4 Yerger R. 307.

² *Mason v. Roe ex. dem. Woods*, 5 Blackford R. 98; *Nalle v. Fenwick*, 4 Rand. R. 594; *Penland v. Stewart*, 4 Dev. & Bat. R. 386; *Mayhew v. Davis*, 4 McLean R. 213; *Mix v. Whitlock*, 1 Tyler R. 30.

³ *Nalle v. Fenwick*, 4 Rand. R. 594; *Den ex. dem. Weed v. McQuilken*, 8 Blackf. R. 335; *The Proprietors of Cardigan v. Page*, 6 N. H. R. 182; *Spear v. Ditty*, 8 Vermont R. 419.

void.¹ In North Carolina the justices of the county constitute the county court, with power to levy taxes. The number of justices corresponds with the number of districts in the county, except where their number has been reduced by death, resignation, or otherwise. The law required a majority of the whole body to be present when a tax was levied. In a case where the record showed that twenty-two were present, the court intended they were a majority.²

The exercise of the power to levy taxes, by the fiscal agents or officers of a county, city, town, &c., is not a judicial, but a municipal act, and is discretionary within the limits prescribed by law, and the order of the tribunal levying the tax, cannot ordinarily be reviewed on *certiorari*, or otherwise. If the assessment be made in violation of law, it is a void act, the collector, in enforcing its collection, is a trespasser, and the purchaser acquires no title at the sale.³

The Illinois statute of February 26, 1839, authorizes and empowers the county commissioners' court to levy a tax for county purposes, not to exceed one-half per cent. upon every one hundred dollars' worth of real or personal property, and then provides, "which tax shall be levied by said county commissioners at their June term, in each and every year."⁴ In several instances the county commissioners failed to levy the tax until the December term following. In such cases is the tax legal? This will depend upon the question, whether this provision is imperative—a limitation, in point of time, upon the power of

¹ *The Proprietors of Cardigan v. Page*, 6 N. H. R. 182; *Nelson v. Pierce*, *Ibid.* 194; *Lisbon v. Bath*, 1 Foster R. 319.

² *State v. McIntoch*, 7 Iredell R. 68.

³ *Marr v. Enlow*, 1 Yerger R. 452; *County Court of Otton v. Maw*, 8 Humph. R. 634.

⁴ *Laws*, 1838-9, p. 11, sec. 20.

the commissioners—or merely directory. Under a directory statute, a duty should be performed at the time specified, for the sake of uniformity, and because the legislature have so ordered it, but it may be valid if performed afterwards; while under a peremptory law, the act must be done at the precise time specified, or it is void.¹ The general rule undoubtedly is, that where a statute directs a court or officer to perform a duty, or exercise a power, at or within a specified time, without any negative words restraining the doing of it afterwards, the naming of the time will be considered as directory, and not as a limitation of authority.² But a negation of authority, at any other than the time specified, need not exist in words; it may arise by implication, from a view of all the provisions of the statute, manifesting an intent, on the part of the legislature, to restrain and limit the execution of the power, or the performance of the duty, in point of time.³ Look at the provisions of the act in question. At the March term of the court, the commissioners were required to appoint assessors and collectors for the ensuing fiscal year.⁴ The assessment was to be completed and returned on or before May 1.⁵ Appeals from the assessment were to be taken and heard at the June term.⁶ The clerk of the county commissioners' court was required to return to the auditor of state, the aggregate amount of *state tax* assessed in his county, immediately after the June term of his court annually, and *by the first day of July*.⁷ On the

¹ *Webster v. French*, 12 Ill. R. 302.

² *Pond v. Negus*, 3 Mass. R. 230; 6 Wend. R. 486; *St. Louis County v. Sparks*, 10 Missouri R. 117; *Walker v. Chapman*, 17 Ala. R. 126.

³ *Marsh v. Chesnut*, 14 Ill. R. 223; *Billings v. Detton*, 15 Ibid. 218; *Thames Manufacturing Co. v. Lathrop*, 7 Conn. R. 550.

⁴ Sec's 5 and 12.

⁵ Sec. 11.

⁶ Sec. 12.

⁷ Sec. 13.

second Monday of August, annually, or as soon thereafter as the collector should be sworn into office, the assessment roll was to be delivered by the clerk of the county commissioners' court, to the collector.¹ The collectors were required, as soon as the lists of taxable property were thus delivered to them, to proceed and collect the taxes, by demand of the owner, and distress of his goods.² A lien upon the goods of the delinquent was created after demand and refusal, but not to continue to exist "*longer than to the expiration of the year for which the taxes are due.*"³ Personal property was not to be seized until twenty days after the demand of the tax, and no sale to take place until fifteen days' notice of the time and place, when and where it was to be made.⁴ If the first distress was insufficient, a second seizure and sale was authorized, upon giving like notice.⁵ The state and county taxes were directed to be collected together.⁶ At the end of each month, the collector was required to pay over to the county treasurer, all taxes collected during the preceding month.⁷ The collector was made responsible for all state and county taxes charged upon his list, unless he used diligence to collect them, and failed in his efforts.⁸ The law required final settlements to be made with the auditor and county commissioners' court, in March, annually.⁹ And the collector was required to report the delinquent list, and demand judgment against the lands embraced in it, at the first term of the Circuit Court to be held after his settlement was made.¹⁰ It would seem, upon a review of these various provisions, that

¹ Sec. 14.² Sec. 16.³ Sec. 16.⁴ Sec. 17.⁵ Sec. 17.⁶ Sec. 20.⁷ Sec. 21.⁸ Sec. 24.⁹ Sec's 21, 22, 23.¹⁰ Sec. 25.

the statute was imperative, and not merely directory, in requiring the county commissioners' court to levy the county tax at their June term. 1. The tax list could not be placed in the hands of the collector on the second Monday in August, if there was a failure to levy the tax at the June term, because the next term of the county commissioners' court would not be held until September. In consequence of this neglect, less time would be allowed to the collector to enforce the payment of the taxes upon his list, against delinquents, than was contemplated by the legislature, and yet he would be held responsible for a failure to use the utmost diligence. He is entitled to the full time designated in the law. 2. If the time given the collector should prove insufficient, the State would, nevertheless, lose her lien upon the goods and chattels of the delinquent. 3. The county would be deprived of its monthly resources, by reason of the neglect of the commissioners to levy the tax in season. 4. The State might be delayed in the collection of her revenues, inasmuch as they were required to be collected along with the county levy, or separate lists for the state and county taxes must be delivered to the collector, which would be contrary to the requirements of the statute. 5. There would be no uniformity in the revenue system, and embarrassment to all concerned would be the consequence. *Lastly*, as the basis of the county levy is the assessment roll, which the law requires to be completed and returned to the clerk of the court, *on or before the first day of May*, and which is held to be imperative,¹ no reason can exist for delaying the levy after the June term.

¹ *Marsh v. Chesnut*, 14 Ill. R. 223; *Billings v. Detton*, 15 Ibid. 218.

The power to levy the tax is a limited one, and if the limits prescribed by the law are transcended, the levy is void.¹ In *Kemper v. McClelland*,² which was an ejectment by the defendant in error against the plaintiff in error, the latter claimed title under a tax sale. The land in controversy lay in Hardin County; the statute attached Hardin to Logan County "for all the purposes of taxation," and limited the power of the county commissioners in fixing the amount *per centum* which they might levy, and made the amount depend upon the aggregate value of all the property listed for taxation. Thus, when the aggregate value was one and a half million of dollars or upwards, the road tax should not exceed one mill upon the dollar; when less, it should not exceed three mills upon the dollar of such valuation; and where the aggregate value should be five hundred thousand or more, and less than one million, the county tax should not exceed three mills on the dollar; and when less than five hundred thousand, such tax shall not exceed five mills upon the dollar. AVERY, J. "When the power of the commissioner is so limited, a tax of any greater amount is unauthorized and void. *In every case, where an individual tax is upon trial shown to be greater than the amount authorized, a sale of the land for the payment of such tax will be deemed void*; and certainly a general tax must be void when no power exists for levying it. It only remains to look at the proof and see if the present is such a case. The proceedings of the commissioners show that a tax of four and a half mills was imposed for county purposes; the certificate of

¹ *West School District of Canton v. Merrills*, 12 Conn. R. 437.

² 19 Ohio R. 324.

the auditor of Logan County shows that the valuation for the two counties for the year 1830 was upwards of five hundred and thirty-seven thousand; that it was over five hundred thousand is taken for granted in the argument. The tax could not, therefore, legally exceed three mills. As it was in this case four and a half mills, the tax sale in controversy, and the deed made in pursuance of it, were void."

Where the inhabitants of a school district voted to raise a tax of \$250, and the assessors charged upon the list a tax of \$285.01, the proceeding was held illegal.¹

In *Mason v. Roe, ex. dem. Woods*,² which was an action of ejectment by the defendant in error against the plaintiff in error, for a lot in Connersville, the plaintiff in error relied alone upon a title, under a sale of the lot for county taxes assessed thereon for the year 1831; but he failed to prove that the board doing county business had *fixed* the amount which should be collected on the value of town lots in that year; and the question was whether proof of such an act of the board was essential to the validity of the title of the plaintiff in error. By the court: "We see no difficulty in this case. The assessment was made under the statute of 1825. By that statute it was the duty of the board doing county business to determine the amount of the tax to be collected on town lots for county purposes. The board had the exclusive authority to determine the amount of the tax; and unless they did determine it, there was no legal tax on the lot in dispute. The defendant therefore failed to prove any legal claim to the lot." In

¹ *Joyner v. Third School District in Egremont*, 3 Cushing R. 567.

² 5 Blackford R. 98.

Doe ex. dem. Weed et al. v. McQuilken,¹ the defendant claimed title to the premises in controversy, under a sale for the following taxes named in the assessment roll, viz: state tax 1,60, county tax 80, road tax 1,50, costs 58, total \$4,48, but offered no proof of the levy of the county tax by the board of commissioners, and the court held that his title was not proved to be valid.

If land be sold for the non-payment of divers taxes, one of which is illegal, and the residue legal, the sale is void: the land must be liable for all the taxes for which it was sold. In such cases all of the proceedings to collect are necessarily void, as it is impossible to separate and distinguish, so that the act should be in part a trespass, and in part innocent.² In *Elwell v. Shaw*, it appeared that there were five distinct taxes assessed, and committed to the collector in separate bills, for the non-payment of all which, the land in controversy was sold. The only objection made to the validity of the sale was, that in one of these assessments the *overlayings* exceeded, by ten dollars and thirteen cents, the amount authorized by statute. The sale was held void. The court say: "The counsel for the tenant relies principally upon the authority of *Coleman v. Anderson*,³ but the assessment there objected to, was made prior to the statute limiting the overlayings to five per cent. Anterior to this statute a practice had arisen, which had been universally acquiesced in, to exceed, in the aggregate

¹ 8 Blackford R. 335.

² *Elwell v. Shaw*, 1 Greenlf. R. 335; *Torrey v. Millbury*, 21 Pick. R. 70; *Bangs v. Snow*, 1 Mass. R. 188-9; *Drew v. Davis*, 10 Vermont R. 506; *Thurston v. Little*, 3 Mass. R. 429, 433; *Dillingham v. Snow*, 5 Ibid. 144; *Stetson v. Hempton*, 13 Ibid. 283; *Libby v. Burnham*, 15 Ibid. 144; *Doe v. M'Quilken*, 8 Blackf. R. 335; *S. C.*, Ibid. 581; *Hayden v. Foster*, 13 Pick. R. 492; *Alvord v. Collin*, 20 Pick. R. 418; *Kemper v. McClelland*, 19 Ohio R. 324.

³ 10 Mass. R. 115.

of the assessment, the entire amount authorized; partly to obviate the perplexity to which assessors were subjected, in consequence of the fractions in the assessment of taxes upon the polls and estates of the inhabitants of the respective towns, and partly to meet abatements and mistakes, and to insure the collection of the whole sum ordered to be assessed. With a view to *sanction, and to limit this discretion*, the legislature at length interposed, and gave to assessors a latitude fully adequate, to enable them to discharge with ease the duties imposed upon them. To suffer them to exceed this limit, would be to subject the citizens to the payment of taxes, to the imposition of which they had never assented, and to create uncertainty in the amount, in violation of the manifest provisions of the statute."

A still stronger case in support of the rule laid down, is that of *Huse v. Merriam*.¹ There the assessment was, - - - - - \$226 62

The levy was, - - - - - \$215 00

Overlayings, 5 per cent. - 10 75 225 75

Excess, - - - - - \$ 87

It was insisted that the proceeding was void because the assessor had exceeded the levy and overlayings authorized by statute, *eighty-seven cents*. The answer was "*de minimus non curat lex*." Mellen, C. J. "It is contended that the sum of eighty-seven cents, over and above the five per cent., is such a trifle as to fall within the range of the maxim, '*de minimus, &c.*,' but if not, that still this small excess does not vitiate the assessment. The maxim is so vague in itself, as to form a very uncertain ground of proceed-

¹ 2 Greenlf. R. 375.

ing or judging ; and it may be almost as difficult to apply it as a rule in pecuniary concerns, as to the interest which a witness has in the event of a cause ; and in such case it cannot apply. Any interest excludes him. The assessment was, therefore, unauthorized and void. If the line which the legislature has established, be once passed, we know of no boundary to the discretion of assessors."

Where the tax is less than the amount authorized by law to be levied, it would seem clear that the sale ought to be maintained, as the error does not prejudice the owner in any respect. In the *Lessee of Hollister v. Bennett*,¹ it was objected that too much tax was charged. The court made an estimate, and it appeared that the tax really due was 81½ cents, while it was charged with only 81 cents and 2 mills, being half a mill less than was due. The court then say: "To the amount of taxes and penalties, should have been added the interest, which was not done, so that the lot, instead of being charged with too much, as was supposed by counsel, was charged with too little."

If a tax is levied for an illegal purpose, it cannot be sustained. The power of taxation is one of the highest attributes of sovereignty. It cannot be enforced against the citizen unless it is clearly and distinctly authorized by law. It is important that it should be known, that the power of the majority over the property, and even the persons of the minority, is limited by law to such cases as are clearly provided for, and defined by the statute which confers the taxing power. Hence, whenever money is raised by taxation, the purpose for which it was

¹ 9 Ohio R. 83.

levied ought to appear upon the face of the proceeding, and if that purpose was illegal, there can be no authority to collect the tax, the officer who attempts to enforce it will be liable in trespass, and the purchaser can acquire no title to the property seized and sold to satisfy it. Thus the levy of a tax for the support of a ministry, or to defend the town against a public enemy, is not warranted by a law conferring power to lay and collect taxes to "defray necessary town charges."¹

In the assessment of taxes, the state, county, city, road, school, and other taxes authorized by law to be levied and collected, ought to be kept separate, and not blended together. The reason is obvious. They are imposed by different authorities, and for different objects. One tax may be levied by competent authority, and for a lawful purpose, while another may be altogether unwarranted. When any tax payer thinks proper, he has a right to look into each one of these taxes separately, and have its legality determined by the appropriate tribunal. This cannot be done where the different taxes are confounded together, and the identity of each is thus destroyed. A confusion of the several taxes cannot take place, without invalidating the entire assessment.²

The State has a lien upon land for taxes actually levied, and also for such as were properly chargeable upon the land, but by reason of the neglect of the officers entrusted with the duty of assessing it, the land was omitted in the list of a particular year. "Back taxes," as they are called, may therefore be

¹ *Lisbon v. Bath*, 1 Foster R. 319; *Bussey v. Gilmore*, 3 Greenlf. R. 191; *Stetson v. Kempton*, 13 Mass. R. 272.

² *State v. Falkenbinge*, 3 Green Law R. 320; *Camden & Amboy R. R. Co. v. Hillegar*, 3 Harrison R. 11.

assessed and collected with the taxes of the current year, although the land upon which they are chargeable has passed into the hands of a bona fide purchaser. This power grows out of the necessities of the government and the nature of a tax lien, which admit no property in the citizen while a tax remains unpaid, and regard the land as a pledge—perpetual in its character—to pay the debts and current expenses of the government. It would be a violation of principle to hold that a public right shall be lost, by the mere delay or neglect of the public agent to enforce it; and in the absence of a statute expressly limiting the time within which it may be done, back taxes may be collected at any time. The State is never guilty of *laches*. In many cases the statute expressly provides that assessments, and reports of delinquents, shall be made not only of taxes for the current, but for “the preceding year or years.” Where such is the language of the law, the right to collect back taxes is clear.¹

The legislature have power to delegate to municipal corporations and other local tribunals or bodies, authority to levy and collect taxes for specified purposes, and to determine the extent of territory which shall constitute a tax district.² While this doctrine is unquestionable, a municipal corporation or other inferior organization possesses no power to levy taxes

¹ *Parham v. Decatur Co.*, 9 Geo. R. 352; *Swan v. Knoxville*, 11 Humph. R. 130; *State v. Pemberton*, Dudley R. 15; *Paden v. Aiken*, 7 Watts & Serg. R. 456; *Curry v. Fowler*, 3 A. K. Mar. R. 504; *Edward v. Beard*, Breese R. 41; *Madison Co. v. Bartlett*, 1 Scam. R. 70-71; *Hayden v. Foster*, 13 Pick. R. 492.

² *Shaw v. Dennis*, 5 Gilm. R. 405; *Fitch v. Pinckard*, 4 Scam. R. 69; *Thomas v. Leland*, 24 Wend. R. 65; *Norwich v. Co. Commissioners, etc.*, 13 Pick. R. 60; *Sawyer v. City of Alton*, 3 Scam. R. 127; *Vanderbilt v. Adams*, 7 Cowen R. 349; *Trustees of Paris v. Berry*, 2 J. J. Marshall R. 483; *Hope v. Deadrick*, 8 Humphrey R. 1.

not *expressly* authorized by its act of incorporation.¹ Where they are thus authorized, they must, in the exercise of the power, conform to the principles and requirements of the constitution.² And where, by charter, such corporation had power to "assess and collect taxes *according to law*," the general law in force at the time of the assessment and collection of the particular tax, was held to be the one intended, and not the law in force at the time of the enactment of the charter; otherwise the corporation would be excluded from a participation in the improvements of the system of taxation which might be made from time to time.³

Where a county or other local corporation levy a tax which is illegal, and the citizen pays the tax to one who has a formal authority to collect it, the payment is not voluntary, but compulsive, and an action will lie against the collector to recover it back, unless he has paid it over to his superiors, in which event the action must be brought against the corporation.⁴ But the fact that a tax is unconstitutional, or otherwise illegal, is no defense to a collector who refuses to pay over the tax after he has collected it.⁵

It is said that a statute authorizing the levy and collection of taxes, if ambiguous or uncertain as to the amount of the levy, should be liberally construed by the courts, and the leaning should be in favor of the larger sum.⁶ On the other hand, the rule is laid

¹ *Asheville v. Means*, 7 Iredell R. 406.

² *Hope v. Deadrick*, 8 Humphrey's R. 1.

³ *Ontario Bank v. Bunnell*, 10 Wend. R. 186.

⁴ *Sumner v. Dorchester*, 4 Pick. R. 361; *Joyner v. Third School District of Egremont*, 3 Cushing R. 567.

⁵ *Waters v. State*, 1 Gill. R. 302; *Moore v. Alleghany City*, 18 Pa. State R. 55.

⁶ *Martin v. Tax Collector*, 1 Speer's Law R. 343; *Bleight v. Auditor*, 2 Munroe R. 27; *Burger v. Carter*, 1 McMullen R. 421.

down that statutes imposing taxes or burdens upon the citizen, must be strictly construed, and the subjects of taxation, and the amount of the tax, must clearly appear. And in *Dwarris*,¹ it is said to be a well settled rule of law, "that any charge upon the subject must be imposed by clear and unambiguous language. Where there is any ambiguity found, the construction must be in favor of the public, because it is a general rule, that where the public are to be charged with a burden, the intention of the legislature must be explicitly and distinctly shown." This would seem to be the safer rule to adopt. Upon this point Chief Justice Ruffin remarks: "I do not think that a strained construction is allowable of an act which levies money from the citizen. The amount of the levy, the subject of it, and the method of raising it, ought to be so plainly pointed out as to avoid all danger of oppression by an erroneous interpretation; and where there is a fair doubt, the citizen should have the benefit of it."² It is also laid down as a rule in the construction of this class of laws, that they ought not to be so construed as to subject the property of any person or corporation to double taxation, unless it is clearly authorized by the words of the law.³

¹ *Dwarris* on Stat. 749; *Butler arguendo* in *Ontario Bank v. Bunnell*, 10 Wend. R. 186; *Sewell v. Jones*, 9 Pick. R. 414; *Savannah v. Hartridge*, 8 Geo. R. 30.

² *State v. Bank of Newbern*, 1 Dev. & Bat. Eq. R. 218.

³ *Bank of Georgia v. Savannah*, Dudley R. 132.

CHAPTER VII.

OF THE AUTHORITY TO COLLECT THE TAX.

THE authority to collect the tax, is a separate and distinct thing from the authority to sell the land, in case the owner proves delinquent, although the same officer usually exercises both powers. When the lands in a collection district have been duly listed and valued, and the tax due upon each tract has been assessed, a list of such lands is placed in the hands of the collector, whose duty it is to proceed, after a day named, to demand the tax of each resident owner, and in case of the neglect or refusal of such owner to pay, to seize the goods, or imprison the body of the delinquent, in satisfaction of the tax; and in the event that the body or no goods and chattels can be found, it is then made the duty of the collector, either to return a list of the delinquents to some other officer, or himself to proceed, in conformity with the law, to make sale of the lands embraced in his list, upon which the taxes remain due and unpaid. This authority is variously denominated the "list," "duplicate," "invoice," or "warrant to collect," according to the peculiar legislation or usage of each State. It has already been shown that the listing, valuation, and levy of the tax, which usually appear

upon one document, called the list, is in the nature of a judgment.¹ Upon the same principle, it may be said that a copy of the list, duplicate, invoice, or warrant to collect, is analogous to an execution, and constitutes the only authority of the officer to proceed and collect the tax, by a demand, or seizure of the body or goods, in case payment is not made of the tax charged.² Without a legal document of this nature, delivered by the officer of the law designated for that purpose, the collector has no authority to proceed to enforce payment of the taxes. His demand, seizure of the body or goods, his return, and all of his other acts, will be nullities, and lay no foundation for the advertisement and sale of the land, by the officer entrusted by law with those duties.³ It must not only be made and delivered by the proper officer, but it must be placed in the hands of the collector *de jure* or *de facto*, and not in those of a mere *usurper*.⁴ However, if an officer *de facto* seize the body or distrain the goods of the tax payer, he will be liable as a trespasser; and every citizen against whom a tax has been assessed, has such an interest in the tax list as will authorize him to be-

¹ See also *Aldrich v. Aldrich*, 8 Metcalf R. 102.

² *Pentland v. Stewart*, 4 Dev. & Bat. R. 386.

³ *Hannel v. Smith*, 15 Ohio R. 134; *Holt's Heirs v. Hemphill*, 3 Ham. R. 232; *State v. Woodside*, 8 Iredell R. 104; *Barnard v. Graves*, 13 Metcalf R. 85; *Homer v. Cilley*, 14 N. H. R. 85; *Chandler v. Spear*, 22 Vermont R. 388; *Dennis v. Shaw*, 5 Gilm. R. 405; *Allen v. Scott*, 13 Ill. R. 80; *Bussett v. Porter*, 4 Cushing R. 487; *Chase v. Sparhawk*, 2 Foster R. 134; *Moore v. Alleghany City*, 18 Pa. State R. 55; *Abbott v. Yost*, 2 Denio R. 86; *Dunning v. Roberts*, 21 Vermont R. 441; *Sheldon v. Van Buskerk*, 2 Comst. R. 473; *Downer v. Woodbury*, 19 Vermont R. 329; *Brackett v. Whidden*, 3 N. H. R. 19; *Dillingham v. Snow*, 5 Mass. R. 558; *Wheeler v. Anthony*, 10 Wend. R. 346; *Hathaway v. Goodrich*, 5 Vermont R. 65; *King v. Whitcomb*, 1 Metcalf R. 328; *Upton v. Holden*, 5 Ibid. 360.

⁴ *Vide* Chapter 4. *Burgess v. Pue*, 2 Gill R. 11; *Hartley v. State*, 3 Kelly R. 233.

come a relator, in an information in the nature of a *quo warranto*, to inquire by what authority the intruder exercises the powers, and performs the duties of the office of collector.¹ Not only must the authority to collect, be made by, and delivered to the proper legal officer, but the copy, invoice, or abstract of the assessment roll, or the warrant to collect, must be duly authenticated, with a view to their legal identity as official documents.² The statute of North Carolina required the clerk of the county court to record the annual return of delinquents, and to deliver to the sheriff a fair and accurate copy of the returns, in alphabetical order, designating, in such copy, the separate amount of taxes accruing from each species of property, and extending the aggregate due from each individual. In *Doe ex dem. Kelly v. Craig*,³ the plaintiff claimed title to the premises in question, under a tax sale held in September, 1838, on unlisted land for the taxes of 1836. To prove the liability of the land for the double tax, because it was not listed by the owner, the sheriff produced a book, which he swore had been delivered him by the clerk, as the copy of the tax list returned to the court, on which he was to collect the tax for that year. To that book the defendant objected, because it was not authenticated as a copy of the tax list, by a certificate of the clerk, or otherwise. The evidence was admitted, and upon inspection it appeared that the land in controversy, was not contained in the copy furnished by the clerk to the sheriff, but it had been entered in another part of the book by the sheriff himself, as property not listed by the owner, and

¹ *Commonwealth v. Brown*, 1 S. & R. 382; *Blake v. Sturtevant*, 12 N. H. R. 567; *Schelenck v. Risley*, 3 Scam. R. 483.

² *Vide* Chap. 18. *Chase v. Sparhawk*, 2 Foster R. 134. ³ 5 Iredell R. 129.

liable to double tax. The plaintiff then, to prove the amount of the double tax, offered the sheriff to prove that in 1837 he saw, either in the clerk's office, the original tax list, or in the hands of his own predecessor, a paper purporting to be a copy of that tax list, made out by the clerk, in which the lot in question was listed by the owner, but whether it was the original or copy he was uncertain. The clerk's office was burnt in 1840, and the original tax list had not been seen since that event took place. Upon this evidence the court instructed the jury that they must be satisfied that the document testified to, was the list of taxable property for 1836, or they would disregard it; but if they were so satisfied, it was immaterial whether the list was the original, or the record thereof by the clerk, or an official copy, as either was sufficient. A verdict was found for the plaintiff, and a judgment rendered thereon, from which the defendant appealed. The judgment was reversed. In delivering the opinion, Chief Justice Ruffin said: "The tax list is the warrant of the sheriff to collect the taxes, and it should be authenticated by the official certificate of the clerk, as a true copy of the original list, filed and recorded in his office. The list ought to be so authenticated, as not only to satisfy the sheriff that it is a copy of the original, but also appear upon inspection, to the citizens, to be official evidence of their liability. It would seem of necessity that a mere copy of the list, not purporting to state what it is, nor whence it comes, nor by whom made, would not answer the purposes intended by the legislature, but that the nature of the document should be stated under the hand of the clerk at least; but at all events it was

not sufficient here, as it was not authenticated by either the certificate of the clerk, or by the oath of a witness, as a copy; nothing more appearing but that the clerk delivered the book to the sheriff, and said it was a copy."

Where the statute requires the list to be delivered to the collector on or before a given day, a delivery afterwards confers no authority upon the officer to proceed and collect the taxes.¹ So, where a day is fixed for the delivery, and it is delivered before the time arrives, the collector has no authority, for, up to the time fixed for delivery, the tax payer has a right to inspect the list, with a view to the correction of errors in the assessment; besides, the authority of the collector being special, it does not attach until such time as the law fixes for its commencement. A statute of New Hampshire required a copy of the invoice from which the assessment was made, to be recorded or left in the town clerk's office. This was omitted, and it was held that until this requirement was complied with, it was illegal to proceed in the collection of the taxes.² The statute of Vermont required a recital of the title, and time of passing the act under which the tax was levied, in the warrant to collect; where the time was misrecited, the warrant was held void.³

Such are the adjudications upon the question of authority to collect, treated as a *distinct fact* in the series of acts which are regarded as essential to the validity of the proceedings. In the chapter relating to the authority of the officer to sell the land as delinquent,

¹ *The Proprietors of Cardigan v. Page*, 6 N. H. R. 182.

² *The Proprietors of Cardigan v. Page*, 6 N. H. R. 182.

³ *Brown v. Wright*, 17 Vermont R. 97.

the subject will be renewed, and more fully explained and illustrated by the authorities. This chapter might be regarded as useless, but for the fact, that in some of the States, the power to sell the land is vested in the hands of a different officer from the collector. In all such cases it is apparent that the power to collect, and the power to sell, are distinct acts, each of which must exist, or the entire proceedings must fall to the ground.

CHAPTER VIII.

OF THE DEMAND OF THE TAX.

THE mere assessment of a tax upon land does not create a *debt* against the owner. It cannot be garnisheed, attached or seized in execution at the suit of a creditor of a municipal corporation.¹ Nor is it a "judgment or contract" which may be set off against the claim of a creditor of a city, within the meaning of the Massachusetts statute.² It may be laid down as an universal rule in the collection of a tax assessed upon the land of resident owners, that the person or personal estate of the delinquent is the primary fund out of which the tax must be made. A sale of the land itself is a *dernier* resort. The tax is never so far regarded as a debt, in order to charge the body or goods of the person against whom it was assessed, until a demand has been made, upon the person taxed, by the collector.³ In *Thompson v. Gardner*,⁴ which was an action of assumpsit by a collector to recover a tax assessed against the defendant, the plaintiff proved a regular assessment of the tax, but failed to prove that he had ever demanded it of the

¹ *Egerton v. Third Municipality*, 1 La. Ann. R. 435.

² *Pierce v. City of Boston*, 3 Metcalf R. 520.

³ *Bott v. Pearly*, 11 Mass. R. 169.

⁴ 10 John. R. 404.

defendant. The court gave judgment for the defendant, saying: "a default in not paying on demand was necessary to be shown. It would be an alarming doctrine to say that a collector of taxes might sue immediately every person upon his assessment roll, without first demanding payment of the taxes." It would be equally alarming to permit the collector to seize and imprison the body, or distrain and sell the personal estate of a citizen against whom a tax has been assessed, without notifying him that the tax is due, and demanding the payment of it. The tax payer must be in default before he can be regarded as a delinquent, and these summary and extraordinary powers, with which the collector is armed, are resorted to. He cannot be in default until he is notified of the tax, and has an opportunity of paying it. If, after a notification is given and a demand made, he neglects or refuses to satisfy the tax, then the power of coercion attaches, and not before. A condemnation without a hearing, or an opportunity of one, would be contrary to natural justice; and it ought not to be presumed that the legislature intended that the summary power of collecting taxes by imprisonment of the body, and distress and sale of the goods, or land of the person assessed, should be arbitrarily exercised by the officer charged with their collection.

In *Ives v. Lynn*,¹ it was objected to a tax sale, that personal notice, or other reasonable and sufficient warning of the assessment of the tax had not been given, and that no demand of payment was made. The statute required the collector to appoint a time and place for receiving taxes; and in case of failure,

¹ 7 Conn. R. 505.

to distrain the goods of the delinquent. The contemporaneous construction of this statute, and long and universal usage under it, authorized a notice by publication on the sign-post of the town. It was proved that this usage had been complied with in this case, and the court maintained the sale.

The principles to be extracted from all of the decisions upon this subject, may be thus stated: 1. Where the statute, under which the proceeding takes place, *expressly* requires a notification and demand, the requisition must be complied with. 2. Where the statute is *silent* upon the question of notice and demand, it must be construed according to the principles of natural justice, which enjoins a personal demand before the person assessed can be regarded as in default. 3. Where the statute does not expressly require a demand of the tax, but authorizes the collectors to appoint a time and place for the payment of the taxes upon his list, and give *general notice* thereof by publication in a newspaper, or by posting the notice in some public place, a personal notice may be dispensed with. A failure to comply with the requirement of the law in this respect, will render a sale of land for taxes void.¹

Under the Illinois statute, the provisions of which have already been recited,² it has been held that a report of the delinquent list by the collector, to the circuit court, in the form prescribed by law, is evidence of a demand, and authorizes the rendition of a

¹ *Johnson v. McIntire*, 1 Bibb R. 295; *Thompson v. Rogers*, 4 Lou. R. 9; *Parker v. Rule's Lessee*, 9 Cranch. R. 64; *Jackson v. Shepard*, 7 Cowen R. 88; *Burd v. Rumsay*, 9 S. & R. 109; *Thompson v. Gardner*, 10 John. R. 404; *Ives v. Lynn*, 7 Conn. R. 505; *Mayhew v. Davis*, 4 McLean R. 213.

² *Ante*, p. 38.

judgment upon the list, though the form is silent as to whether a demand was or was not made, and the collector failed to state the fact in relation to a demand.¹ The contrary was held by Judge Pope, District Judge of the United States Court in Illinois, upon the construction of the same statute.² It is an open question under this statute, whether, on proof that no demand was in fact made by the collector, the sale can be sustained. The deed is not made evidence of a demand, but it has been generally supposed that the judgment would conclude the former owner.

¹ *Taylor v. People*, 2 Gilm. R. 349 ; *Job et al. v. Tibbets*, 5 Ibid. 382.

² *Mayhew v. Davis*, 4 McLean R. 213.

CHAPTER IX.

OF THE SEIZURE OF THE BODY, OR GOODS AND CHATTELS
OF THE DELINQUENT, TO SATISFY THE TAX.

WHERE the person against whom a tax has been legally assessed, neglects or refuses to pay the tax *voluntarily*, after a notification and demand made by the collector in the manner prescribed by law, the necessities of the State compel a resort to *coercive* means. In some States the law requires the body of the delinquent to be arrested, and imprisoned in satisfaction of the tax.¹ In the case last cited, under a statute which required the body of a resident proprietor to be imprisoned until the tax was paid, and the land of a non-resident to be sold in satisfaction, it was held that an action for false imprisonment would lie against the tax collector, for seizing and imprisoning the body of a non-resident proprietor, who came into the State for a temporary purpose. The evident intention of the law was to make the tax a charge upon the person of the resident, and upon the land of the non-resident owner. In other States, the law requires the tax to be collected out of the personal estate of the delinquent, if a sufficiency

¹ *Bassett v. Porter*, 4 Cushing R. 487; *Daggett v. Everett*, 19 Maine R. 373; *Rising v. Granger*, 1 Mass. R. 48.

can be found to satisfy it.¹ In South Carolina, the statute thus marshals the remedies: 1. A distress of the personal estate of the delinquent. 2. The sale of the land. 3. The seizure and imprisonment of the body.² A violation of the order of remedies thus prescribed, invariably renders the act of the officer illegal. It is the policy of the law to resort to the land itself, only when all other remedies fail to enforce a satisfaction of the tax. The person or personal estate of the delinquent is regarded as the *primary*, the land the *dernier* resort. The tax never becomes a charge upon the land, until the other remedies have been exhausted. In this respect the power of the collector is limited; the remedies prescribed, and the order in which they are directed to be enforced, are prerequisites, and must be as strictly complied with as any other requirement of the law, from the beginning to the end of the proceedings. The law admits of no substitution or change in the order thus established. It is, therefore, held that the land of the delinquent cannot be sold in those States which authorize imprisonment, if his body can be found, nor can a resort be had to the land, in States where the personal estate is regarded as the primary fund, as long as a sufficiency of personal estate can be seized and sold in satisfaction of the tax. A sale of the land under such circumstances, is illegal and void.³ The strongest case upon this point, is that of

¹ *Vide cases cited supra*, Note 3.

² *Kingman v. Glover*, 3 Richardson Law R. 27.

³ *Yancy v. Hopkins*, 1 Munf. R. 419, 437; *Jackson v. Shephard*, 7 Cowen R. 91; *Parker v. Smith*, 4 Blackf. R. 70; *Scales v. Avis*, 12 Ala. R. 617; *Baltimore v. Chase*, 1 Gill & John. R. 376; *Dallam v. Oliver*, 3 Gill R. 445; *Burd v. Rumsey*, 9 S. & R. 109; *Cox v. Grant*, 1 Yeates R. 164; *Francis v. Russell*, 5 Haywood R. 294; *Hamilton v. Buram*, 3 Yerger R. 355; *Doe ex dem. Gladney v. Devours*, 11 Geo. R. 79; *Gouverneur v. New York*, 2 Paige R. 434; *Stead's*

Scales v. Aris.¹ The statute of Alabama provided, that "where the delinquent has no goods and chattels within the county, then the lands and tenements of said delinquent may be sold by the collector, &c." The facts were, that the delinquent had a yoke of oxen in the county, of value sufficient to satisfy the tax, but they were exempt by law from execution for the debts of the owner. The court held the sale of the land void under these circumstances, and, in their opinion, say: "It will thus be seen that the power of the collector to sell lands, is limited to those cases where the delinquent has no goods and chattels within the county. There is no provision made for cases where the collector is unable to find, or the delinquent is unwilling to surrender goods. The power exists only where there are no goods; and conforming to the principle of the many cases on this subject, we are constrained to decide, that as there was personal property of the delinquent within the county, the collector had no discretion to sell the land." In answer to the argument made in support of the sale, that the statute of the State exempted the oxen from execution, the court held, 1. That the statute did not, in terms, apply to a distress for taxes; and, 2. That the State, not being named in the act, was not bound by it. Under the statute of Tennessee, which required the collector, in case he could find no goods and chattels of the delinquent, out of which the tax could be made, to make report to the county court, and apply for judgment against the land taxed, it was held that unless the fact affirmatively appeared upon

Executors v. Course, 4 Cranch R. 403; S. C., 2 Pet. Cond. R. 151; *Parker v. Rule*, 9 Cranch R. 64; S. C., 3 Pet. Cond. R. 271; *Thatcher v. Powell*, 6 Whea. R. 119; S. C., 5 Pet. Cond. R. 28.

¹ 12 Alabama R. 617.

the face of the record, that the owner had no goods and chattels, the court had no jurisdiction to render a judgment against the land, and that a sale, under such circumstances, could not be supported.¹ The statute of Illinois provided, that "when any person, owning lands in any county in this State, shall fail to pay taxes assessed thereon, and the collectors shall be unable to find any personal property of such person in his county, whereon to levy, of value sufficient to pay said taxes and costs, it shall be the duty of the collector to make report thereof, to the circuit court of his county, at the first term in each year, for the preceding year or years, which report shall be in the following form :

"List of lands and other real estate, situated in the County of ———, and State of Illinois, on which taxes remain due and unpaid, for the year herein set forth."

Name of present Owner.	Town Lots.	In whose name patented.	Cost.	Amount of tax.	Years for which tax is due.	Valuation.	Description.	County.

The law also required the collector to give notice of his intention to apply to said court for a judgment against the lands embraced in said report, by publication in a newspaper, &c., and he was also directed to file a copy of said advertisement, together with a certificate of the printer, showing the due publication of the same. It was then made the duty of the court

¹ *Francis v. Russell*, 5 Haywood R. 294, 394 ; *Hamilton v. Buram*, 3 Yerger R. 355 ; *Thatcher v. Powell*, 6 Whea. R. 119 ; S. C., 5 Pet. Cond. R. 28.

to hear and determine the application, in a summary way, without pleadings, and unless some valid objection was interposed by those interested in the list, to render judgment against said lands. Upon this judgment, the clerk was directed to issue and deliver to the collector, a precept, commanding him to sell the lands against which judgment had been obtained as aforesaid. Upon the construction of this statute, it has been held by the Supreme Court of Illinois, in two cases, one of which arose collaterally, and the other upon writ of error, to reverse the judgment at where the collector makes a report in the form prescribed by the statute, it will be presumed that the delinquents reported, had no personal property; that this presumption may be rebutted by proof, upon objection taken to the rendition of the judgment; but if the owner makes no defense, and suffers a judgment to be entered against the land, the judgment thus rendered, becomes conclusive in all collateral actions, and cannot be impeached by showing that the report of the collector, in this respect, was false; and, on error, the court will, by intendment, support the judgment where the record does not affirmatively show that the owner had goods.¹ The contrary principle was maintained by Judge Pope, in the United States Court for the district of Illinois.²

¹ *Taylor v. People*, 2 Gilm. R. 349; *Job v. Tabbetts*, 5 Ibid. 376.

² *Mayhew v. Davis*, 4 McLean R. 213.

CHAPTER X.

OF THE RETURN OF THE DELINQUENT LIST.

IN several of the States, as heretofore remarked, the power to collect the tax, and the power to sell the land in case of non-payment, is vested by law in different officers.¹ When such is the case, the statute usually requires the collector to return a list of delinquents to his superior, in a certain prescribed form, authenticated or verified in a particular manner, and within a limited time. When such is the requirement, it is regarded as imperative, and not directory, and an exact compliance is demanded. This return is the only evidence of delinquency—of the fact that a demand was made, by the collector, upon the person against whom the tax was charged—and that the body of such person could not be found within the district of the collector; or, that the delinquent had no goods and chattels within the district out of which the taxes could be made. Besides, the return is the foundation of the authority of the superior—to whom it is required to be made—to sell or order a sale of the land of the delinquent. If the officer to whom the return is made, is the person to whom the power

¹ *Ante* Chapter 7.

of sale is entrusted, the return constitutes his authority to sell—if he is directed to issue a warrant or order to some third person to make sale of the lands embraced in the delinquent list, the return is the basis upon which he issues the order or warrant. Such was the requirement in Illinois, Ohio, Vermont, New York and New Hampshire.¹ A neglect, therefore, to make this return in the form, manner and time prescribed, is fatal to the validity of a tax sale. The Ohio statute required that the return should be attested by the oath of the collector. In the case of *Harmon v. Stockwell*,² the return was sworn to before the county auditor, and it was contended that the auditor had no authority to administer the oath, and therefore the sale was void. The court sustained this position, saying: “as the penalties of perjury were intended to be imposed for a false return, it is clear that the oath must be administered by competent authority. If the auditor at that time possessed no such power, the list wants an essential requisite which invalidates the sale. The power to administer an oath is *incidental* to no officer except the *judicial*. It must be conferred by statute, either directly or by implication, or ministerial officers do not possess it.” The court then proceed to examine the statutes of Ohio, relative to the powers and duties of county auditors, and thus conclude: “We therefore find no authority in any of the statutes enabling the auditor to administer oaths, except in certain specified cases,

¹ Rev. Laws Illinois, 1833, p. 524, Sec. 3, and p. 528, Sec. 1; *Messenger v. Germain*, 1 Gilm. R. 631; *Harmon v. Stockwell*, 9 Ohio R. 93; *Hannel v. Smith*, 15 Ibid. 134; *Doe v. Whitlock*, 1 Tyler R. 305; *Winder v. Sterling*, 7 Hammond R. 190 (Part 2); *Jackson v. Morse*, 18 John. R. 442; *Tallman v. White*, 2 Comstock R. 66; *Homer v. Cilley*, 14 N. H. R. 85.

² 9 Ohio R. 93.

and the instance before us is not one of them. The grant of authority in those specified cases sufficiently implies that he possessed it in no others. The return of the collector, therefore, was not made under the *securities* and *sanctions* which the law required; and this omission is fatal to a title held under such strict principles as a tax sale, and supersedes the necessity of looking further into the case." Under another statute of Ohio, the county treasurer was empowered to collect the taxes; and in case he was unable to do so, he was required to make a return of the delinquents to the county auditor, and to sign and testify to its correctness under oath or affirmation, to be administered by the county auditor. The county auditor was required to make a complete record of this return. In *Minor v. McLean*,¹ the record offered in evidence did not show affirmatively that the oath had been taken by the treasurer, but a *transcript* of the record did. The sale in question was held void, because the oath was essential to the validity of the return, and it must appear upon the record; no inferior evidence being admissible for the purpose of supplying the defect. In Illinois a return of the delinquent list to the circuit court, constitutes the authority of that court to enter judgment against the delinquent list.² So in Tennessee³ and Ohio.⁴

¹ 4 McLean R. 138.

² *Spellman v. Curtenius*, 12 Ill. R. 409.

³ *Thatcher v. Powell*, 6 Whea. R. 119.

⁴ *Wilkins v. Huse*, 9 Ohio R. 154.

CHAPTER XI.

OF THE PROCEEDINGS WHERE A JUDICIAL CONDEMNATION IS
REQUIRED.

It has been observed already, that in some of the States, the power to sell land for the non-payment of taxes, does not arise until the delinquency of the owner has been judicially ascertained.¹ The character, requisites and effect of these proceedings, vary according to the peculiarities of the local law under which they are carried on. There are, however, some general principles, which are regarded as landmarks, and uniformly adhered to. It is a familiar principle, that a judgment is conclusive upon parties and privies, where the court had jurisdiction to render it. Unless such jurisdiction exists, the judgment is a nullity, and may be impeached collaterally. This jurisdiction must extend to the parties as well as to the subject matter. True, authorities may be found which advance the position, that a judgment of a court of general jurisdiction cannot be questioned in a collateral action, for want of jurisdiction over the parties;² but this doctrine seems to be at war with the fundamental principles of our institu-

¹ *Ante*, p. 38.² 2 Am. Lead. Ca. 737.

tions. There is no such thing as unlimited power in this country, and no power which can be exercised arbitrarily. No such principle exists, as that the courts can do no wrong. The acts of every tribunal acting under the authority of law, may be questioned and tried by the law of its organization. The legislature itself, is limited by the Constitution. Judicial power can rest upon no broader foundation. No man shall be condemned without notice and an opportunity of being heard. Such is the mandate of the Constitution. If courts may disregard this provision, it is impossible to perceive what plausible reason can be urged against the validity of an act of the legislature, divesting a man of his estate, or depriving him of his liberty. The great objection to such legislation is that it is *ex parte*. If the courts can thus proceed without notice, why may not the legislature? It is a simple choice of tyrannies. If such a principle once gains a foothold, the dominion of a mob would be a merciful substitute for such a power. The only reason why a judgment is regarded as conclusive, is, that an end may be put to litigation. Public policy demands repose under such circumstances; but there is neither justice or sound policy in closing the courts against one who has never litigated his rights, or had an opportunity of doing so. An estoppel is regarded as odious, because it shuts out the truth; but it would be the essence of injustice to maintain an estoppel against one who has been passive, without knowledge of any necessity for action. The law of rehearings, reviews and new trials, is opposed to this doctrine, and strongly, too, for that law presupposes a notice and hearing, but opens the litigation because injustice may have been

done to the party complaining. Therefore, to constitute a valid judgment, it must have been rendered by a tribunal having jurisdiction over the subject matter of the litigation, and over the parties to it. A court has jurisdiction of the subject matter, where by law, authority has been conferred upon it, to hear and determine the particular cause of action in controversy between the parties; and it has jurisdiction over the person of the defendant, when he voluntarily appears to the action, or has been actually served with process, or has had constructive notice of the pendency of the suit, in the manner prescribed by law. This principle is applicable to all courts. The only difference between courts of general, and those of special jurisdiction, is this: to support the act of the former, it is not necessary that the facts and circumstances which justify its action, should appear affirmatively upon the face of its record, it will be presumed that they existed, whether the validity of the judgment is questioned collaterally, or upon writ of error.¹ On the other hand, where the court is one of special jurisdiction, the facts upon which that jurisdiction depends, must affirmatively appear upon the face of its record.² And some of the cases go further, and hold that those facts must appear at large, and not by way of recital.³ When it is shown

¹ *Grignon's Lessee v. Astor*, 2 Howard U. S. R. 319; *Den ex. dem. Obert v. Hammel*, 3 Harrison N. J. R. 319; *Kempe v. Kennedy*, 2 U. S. Cond. R. 223; *Raymond v. Bell*, 18 Conn. R. 87-9; *Propst v. Meadows*, 13 Ill. R. 168-9; *Kenny v. Greer*, *Ibid.* 433; *Foot v. Stevens*, 17 Wend. R. 483; *Peacock v. Bell*, 1 Saund. R. 73; *Hart v. Seizus*, 21 Wend. R. 40; *Voorhees v. U. S. Bank*, 10 Pet. R. 449; *Young v. Lorrain*, 11 Ill. R. 636-9; *Wyman v. Campbell*, 6 Porter R. 236, 243; *Doe v. Wise*, 5 Blackf. R. 402; *M'Iroy v. Speed*, 4 Bibb R. 85; *Fridge v. State*, 3 Gill & John. R. 103; *Van Wormer v. Mayor of Albany*, 15 Wend. R. 262; *Paine v. Moreland*, 15 Ohio R. 444-5.

² *Vide Cases cited ante*, pp. 52-3.

³ *Rex v. Croke*, Cowper R. 26.

that a court of general jurisdiction had no authority in fact, to hear and determine the cause, and when the record of the special tribunal fails to show, upon its face that authority, the act of each is a nullity, and will be so treated in all other courts and places, where the validity of their judgments is drawn in question.¹

These general principles are applied to the records of judgments in tax proceedings. In *Thatcher v. Powell*,² Chief Justice Marshall says: "In summary proceedings, where a court exercises an extraordinary power, under a special statute prescribing its course, we think that course ought to be exactly observed, *and those facts especially which give jurisdiction ought to appear*, in order to show that the proceedings are *coram judice*." And it makes no difference whether this power is conferred upon a special tribunal created for the sole and only purpose of trying tax causes, or whether the power is superadded to a court of general common law and chancery jurisdiction. When this special power is conferred upon such courts, to be exercised in a summary way, they are treated in the exercise of this particular power as courts of special jurisdiction.³ In Indiana the rule is much more strict. Not only must the jurisdiction affirmatively appear, but the evidence upon which the court acted must be set forth at large in the record; in other words, a complete record of all the tax proceedings anterior to

¹ *Williamson et al. v. Berry*, 8 Howard U. S. R. 540-1; *Glass et al. v. Sloop Betzy*, 3 Dallas R. 7; *Rose v. Himely*, 4 Cranch R. 241; *Elliot v. Piersol*, 1 Pet. R. 328; *Wilcox v. Jackson*, 13 Pet. R. 499; *Shriver v. Lynn*, 2 Howard U. S. R. 59; *Hickey v. Stewart*, 3 Ibid. 750; *Rogers v. Dill*, 6 Hill N. Y. R. 415; *Latham v. Edgerton*, 9 Cowen R. 227; *Homer et ux. v. Doe*, Smith Ind. R. 10; S. C., 1 Carter R. 130; 2 Am. Lead. Ca. 733-6.

² 6 Whea. R. 119.

³ *Young v. Lorrain*, 11 Illinois R. 636-7.

the judgment must be made and preserved.¹ This is in accordance with the general principles applicable to summary proceedings.² But it must be remembered that all of these cases were decided upon writs of error, and did not arise collaterally. The true rule undoubtedly is, that if the jurisdiction appears by recital or otherwise upon the record, the judgment will be sustained, although the evidence upon which they acted is not spread upon the record.³ The effect thus given to this class of judgments, where their jurisdiction is once established, is substantially the same given to a judgment rendered by a court of general jurisdiction proceeding according to the course of the common law. The reversal of such judgment will not defeat the title of a purchaser acquired while the judgment was in full force; and the judgment itself, so long as it remains in force, cannot be impeached collaterally, unless it be absolutely void.⁴ The Tennessee statute required the collector to make the money out of the goods and chattels of the person in whose name the land was listed; if the owner failed to pay on demand, or had no goods and chattels, the collector was required to report a list of the delinquents to the county court; the court was directed to cause an advertisement to be published in a newspaper, stating that application was made for a

¹ *Dentler v. State*, 4 Blackf. R. 258; *Smith v. State*, 5 Ibid. 65; *Williams v. State*, 6 Ibid. 36.

² *Judson v. State*, 1 Minor R. 53; *Yancy v. Hopkins*, Ibid. 171; *Bates v. Planters' and Merchants' Bank*, 8 Porter R. 99; *Crawford v. State*, 1 Minor R. 143; 1 Chandler's R. 29; *Harryman v. Titus*, 3 Missouri R. 302; *Zurchee v. Magee*, 2 Ala. R. 253; *Bates v. Branch Bank of Mobile*, Ibid. 689; *Brown v. Wheeler*, 3 Ibid. 287; *Bettis v. Taylor*, 8 Porter R. 564.

³ *Chesnut v. Marsh*, 12 Ill. R. 173; *Rogers v. Park*, 4 Humph. R. 480; *McCarroll v. Weeks*, 4 Haywood R. 246; *Taylor v. People*, 2 Gilm. R. 349.

⁴ *Lessee of Wilkins' heirs v. Huse et al.*, 9 Ohio R. 154; *Chesnut v. Marsh*, 12 Ill. R. 173; *Spellman v. Curtenius*, Ibid. 409.

judgment against the lands, and upon the day named in the notice it was the duty of the court to render judgment upon the list. In the construction of this statute, it has been decided that the following jurisdictional facts must appear in the record, or the judgments will be a nullity, and no title can be acquired under it: 1. That the land was situate in the county where it was taxed and reported; 2. That the owner had no goods and chattels out of which the tax could have been made; 3. That notice was given of the application in due form of law; and, 4. That the taxes were due and unpaid upon the land.¹

The Indiana statute of 1832 required the collector to deliver to the school commissioners a description of the lands upon which taxes were due and unpaid, and in case the owners failed to redeem the same within three years from the time of the delivery of said lists, the law provided that they might be sold in such manner as the legislature might thereafter prescribe, for the benefit of the school fund. In 1835 an act was passed, prescribing the manner in which such lands might be forfeited and vested in the State for the use of the said school fund. This statute required, among other things, that a list of the lands should be advertised, and that the notice should express that unless the taxes were paid by the next ensuing term of the circuit court, a motion would be made for a judgment of forfeiture, etc. In one case it did not appear that the notice of the motion contemplated had been given, but the record recited that

¹ *Thatcher v. Powell*, 6 Whea. R. 119; *McClung v. Ross*, 5 Whea. R. 116; S. C., 5 U. S. Cond. R. 602; *Francis v. Russell*, 5 Haywood R. 294; *McCarroll v. Weeks*, 4 Ibid. 246; *Campbell v. McIrwin*, Ibid. 60; *Anderson v. Patten*, 1 Humph. R. 369; *Rogers v. Park*, 4 Ibid. 480; *Hamilton v. Burum*, 3 Yerger R. 155; *McCarroll v. Weeks*, 2 Tenn. R. 219.

"the court was satisfied that all the proceedings required by law had taken place, etc." The court held that this recital amounted to nothing. The record must show what those proceedings were, in order that the appellate court may have an opportunity to determine whether they were all that the statute required to give the circuit court jurisdiction.¹ And in another case, the court held that the proceedings required by law to take place anterior to the collector's return, must also appear upon the record, as well as the notice of the motion.² The Ohio statute of January 30, 1822, authorized the rendition of a judgment, by the Common Pleas Court, after notice, upon the delinquent list, and declared the tax deed, made in pursuance of it, to be evidence of the regularity of the proceedings, and that the title thereby conveyed should not be "invalidated or affected by the reversal of such judgment, or any error therein, or by any error in the proceedings previous to the rendition of any such judgment, relating to the charging or collecting of taxes on such lands, or the obtaining of such judgment." The law further required that a list of the lands against which judgment was pronounced, should be certified by the clerk of the court to the county auditor, together with an order of sale. The auditor was thereupon directed to give notice, and on the day named therein, to proceed and sell the land, and make return of his proceedings to the court; and it was made the duty of the court to approve the sale, if regular, and order a deed to be executed and delivered to the purchaser. In the construction of this statute, it has been held that the

¹ *Dentler v. State*, 4 Blackf. R. 258; *S. P. Smith v. State*, 5 Ibid. 65.

² *Williams v. State*, 6 Blackf. R. 36.

prerequisites to a valid sale and conveyance were, 1. A judgment rendered by a court of competent jurisdiction; 2. A precept to the county auditor directing a sale; 3. Due notice of the time and place of sale; 4. A sale in pursuance of such notice; 5. A return of the proceedings; 6. A confirmation of the sale, and an order for the execution of the deed to the purchaser; and, 7. A deed executed in pursuance of the order. When these facts exist, the effect of the judgment is to conclude the rights of all concerned; no informality, no irregularity, no errors in any of the previous proceedings, can vitiate it. A misdescription of the land in the assessment roll cannot be taken advantage of. The only objections which can be made to the judgment is a want of jurisdiction.¹

The statute of Illinois of February 26, 1839, contains the following sections:

“Assessors shall finish taking in the list of taxable property on or before the first day of May, annually; and each assessor shall, on or before the said first day of May, deliver to the clerk of the commissioners’ court of his county the abstract of lands furnished him by the clerk, together with the original list of taxable property within his district, also a copy of said list; the copy shall contain the names of all persons owning taxable property within his district, arranged and written in alphabetical order; the original list shall be filed and preserved by the clerk, and a copy shall be delivered over to the collector of taxes, as hereinafter provided.”²

“On the second Monday of August annually, or so

¹ *Rennick et al. v. Wallace*, 8 Ohio R. 540; *Lessee of Wilkins’ heirs v. Huse et al.*, 9 Ibid. 154.

² Sec. 11.

soon thereafter as collectors shall have been sworn into office, the clerks of the county commissioners' courts shall deliver to the collectors of their respective counties, the alphabetical lists of taxable property returned to them by the assessors, and take duplicate receipts for the same, in which shall be specified the amount of taxes to be collected upon the lands contained in the lists, and the amount to be collected upon the personal property ; one of which receipts shall be filed by the several clerks of the county commissioners' courts in their office, and the other shall be delivered to the county treasurer of the proper county, and by him filed in his office."¹

"The collectors of the several counties shall, so soon as the lists of taxable property are delivered to them, proceed to collect the taxes charged upon said lists, by calling upon each and every person residing in their respective counties, at his or her usual place of residence, and requiring payment thereof ; and each and every person shall be charged with and required to pay to the collector twenty cents on every hundred dollars' worth of property listed for taxation ; and a lien is hereby created and declared to exist, in favor of the State, upon every article of personal property owned by any person charged with taxes, from and after the taxes shall have been demanded by the collector ; and no sale or transfer of the same shall affect the claim or lien of the State, but the said property shall be liable to be seized by the collector, in whosoever hands or possession the same may be found, and sold to satisfy such taxes, and all cost and charges attending the collection of the same : *Provided*, The lien aforesaid shall not continue to exist

¹ Sec. 14.

longer than to the expiration of the year for which the taxes are or may be due. If any person charged with taxes shall be absent from home when the collector shall call upon him or her for payment thereof, the collector shall leave a written notice at the residence of every such person, stating the amount of taxes due from such person, and requiring him or her to make payment of the same at some time after the expiration of ten days from the date of the notice, and at a place to be specified in the notice; and such notice shall be considered as a demand for the taxes within the meaning of this act.”¹

“If any person shall fail to pay his or her taxes when demanded by the collector, or within twenty days after such demand, the collector is authorized and required to seize and levy upon any personal property of such person, of value sufficient to pay the taxes and costs, and to advertise and sell the same at public vendue; he shall give fifteen days’ notice of the time and place of sale, by posting one advertisement on the door of the court-house of his county, and at three public places in the neighborhood of the place of sale; and if the property seized shall not sell for a sum sufficient to pay the taxes and costs, the collector may seize and sell any other personal property of the person in default, upon giving the notice of sale as aforesaid; and if any article of property so seized shall sell for more than the taxes and costs due, the collector shall, upon demand, refund the overplus to the owner.”²

“When any person owning lands in any county in this State, shall fail to pay the taxes assessed thereon, and the collectors shall be unable to find any per-

¹ Sec. 16.

² Sec. 17.

sonal property of such person in his county, whereon to levy, of value sufficient to pay said taxes and costs, it shall be the duty of the collector to make report thereof, to the circuit court of his county, at the first term in each year, for the preceding year or years, which report shall be in the following form :

*List of lands and other real estate, situated in the County of ———, and State of Illinois, on which taxes remain due and unpaid, for the year herein set forth.”*¹

Name of present Owner.	Town Lots.	In whose name patented.	Cost.	Amount of tax.	Years for which tax is due.	Valuation.	Description.	County.

“ Before making the application to the circuit court provided for in the preceding section, the collector shall publish an advertisement in some newspaper printed in his said county, if any such there be, and if there be no such paper printed in his county, then in the nearest newspaper in this State, which advertisement shall be once published, at least six weeks previous to the said term of the said circuit court ; and the said advertisement shall contain a list of the delinquent lands and town lots to be reported to said court, the names of the owners, if known, the amount of taxes, interest and costs due thereon, and the year or years for which the same are due ; shall give notice of the intended application to the court for judgment against said lands and town lots for said

¹ Sec. 25.

taxes, interest and costs thereon, and for an order to sell the said lands for the satisfaction thereof; and shall also give notice that on the second Monday next succeeding the said term of the said circuit court, all the lands against which judgment shall be pronounced, and for the sale of which such order shall be made, will be exposed to public sale, at the court house of the said county, for the amount of said taxes, interest, and costs due thereon; and the advertisement published according to the provisions of this section, shall be deemed and taken to be sufficient and legal notice, both of the aforesaid intended application by the collector to the circuit court for judgment, and also of the sale of said lands, under the order of said court.”¹

“The collector shall obtain a copy of the said advertisement, together with a certificate of the due publication thereof, from the printer or publisher of the newspaper, in which the same shall have been published, and shall file the same with the clerk of the said circuit court, at the said term thereof, together with the said report provided for in the twenty-fifth section of this act.”²

“The clerk of the circuit court, upon the filing of such report and certificate of publication by the collector, shall receive and record the same in a book to be kept for that purpose, in which he shall enter all judgments, orders, and other proceedings of the court in relation thereto, and shall keep and preserve the same as a part of the records of his office; and the said clerk shall place the said report and certificate of said collector at the head of the common law

¹ Sec. 26.

² Sec. 27.

docket for said term, in the following form, to wit:

State of Illinois,	}	Suit for taxes." ¹
vs.		
John Doe and others.		

"It shall be the duty of said court, upon calling the common law docket of said term, if any defense be offered by any of the owners of said lands so reported, or by any person having a claim or interest therein, to hear and determine the same in a summary way, without pleadings; and if no defense be made, the said court shall pronounce judgment against the said lands, and shall thereupon direct the clerk of said court to make out and issue an order for the sale of the same, which shall be in the following form, to wit:

State of Illinois,	}	sct.
— county,		

Whereas, A. B., collector of said county, returned to the circuit court of said county, on the ——— day of ———, 18—, the following tracts and parts of tracts of land, as having been assessed for taxes by the assessor of said county of ———, for the year 18—, and that the taxes thereon remained due and unpaid on the day of the date of the said collector's return, and that the respective owner or owners have no goods and chattels within his county on which the said collector can levy for the taxes, interest and costs due and unpaid on the following described lands, to wit: [*Here follows the list.*]

And whereas, due notice has been given of the intended application for a judgment against said lands, and no owner hath appeared to make defense or show cause why judgment should not be entered

¹ Sec. 28.

against the said lands for the taxes, interest and costs due and unpaid thereon, for the year or years herein set forth: Therefore, it is considered by the court, that judgment be, and is hereby, entered against the aforesaid tract or tracts of land, or parts of tracts, (as the case may be,) in the name of the State of Illinois, for the sum annexed to each tract or parcel of land, being the amount of taxes, interest and costs due severally thereon; and it is ordered by the court, that the said several tracts of land, or so much thereof as shall be sufficient of each of them to satisfy the amount of taxes, interest and costs annexed to them severally, be sold, as the law directs.”¹

“That the form as herein before set forth shall be pursued as near as the nature of the case will permit.”²

“That it shall be the duty of the clerk, within five days after the adjournment of said court, to make out under the seal of said court, a copy of the collector’s report, together with the order of the court thereon, which shall hereafter constitute the process on which all lands shall be sold for taxes, and deliver the same to the sheriffs of his county; and the sheriff shall, thereupon, cause the said lands to be sold on the day specified in the notice given by the collector for the sale of the same, and make return thereof to the said clerk within twenty days after the day of sale.”³

“Any person or persons owning or claiming lands, advertised for sale as aforesaid, may pay the taxes, interest and costs due thereon, to the collector of the county in which the same are situated, at any time before the sale thereof.”⁴

“Lands and real estate which, at the time of sale, belonged to infants, femmes covert, or lunatics, may be

¹ Sec. 29.

² Sec. 30.

³ Sec. 31.

⁴ Sec. 32.

redeemed upon the terms specified in the preceding section, at any time within one year from the time the disabilities of such person shall cease to exist; and if there be several infants owning a joint, or joint and several interest in any lands or real estate sold for taxes, such infants, or any one of them, may redeem the same from such sale at any time within one year after the youngest one of them shall arrive at the age of twenty-one years; and any person claiming the right to redeem land under the provisions of this section, shall produce to the clerk of the county commissioners' court of the proper county, the affidavit of some credible person, stating who owned the same at the time of the sale thereof; and if the owner was a feme covert at the time of a sale, stating that fact, and the time at which he or she became of age; or if there were several infant owners, stating that fact, and stating the age of the youngest of such infants; and if the clerk shall be satisfied, from the facts stated in the affidavit, that the lands proposed to be redeemed, are subject to redemption under the provisions of this section, or any other law of the State, he shall file the affidavit so presented, and permit the lands to be redeemed, upon the conditions which are or may be required by law; and such redemption shall operate to restore to the owner or owners of the land, his, her, or their heirs or assigns, all rights which he, she or they had in and to the same at the time of sale: *Provided, however,* That the certificate of redemption shall not be evidence of any other fact than that the redemption money was paid."¹

"Immediately after the expiration of the term of

¹ Sec. 39.

two years from the date of the sale of any land for taxes under the provisions of this act, the sheriff shall make out a deed for each lot or parcel of land sold, and remaining unredeemed, and deliver the same to the purchaser upon the return of the certificate of purchase. Deeds executed by sheriffs shall be in the following form :

Know all men by these presents, that whereas, at ——— term, 18—, of the circuit court of ——— county, a judgment was obtained in said court, in favor of the State of Illinois, against the [here insert the description of the land] for the sum of ——— dollars and ——— cents, being the amount of taxes, interest and costs, assessed upon said tract of land for the year 18—, and whereas, on the ——— day of ———, 18—, I, A. B., sheriff of the county aforesaid, by virtue of a precept issued out of the circuit court of the county aforesaid, dated the ——— day of ———, and to me directed, did expose to public sale at the door of the court house, in the county aforesaid, in conformity with all the requisitions of the statute in such case made and provided, the tract of land above described, for the satisfaction of the judgment so rendered as aforesaid ; and whereas, at the time and place aforesaid, C. D., of the county of ———, and State of ———, having offered to pay the aforesaid sum of ——— dollars and ——— cents, for ——— which was the least quantity bid for, the said tract of land was stricken off to him at that price. Now, therefore, I, A. B., sheriff as aforesaid, for and in consideration of the said sum of ——— dollars and ——— cents, to me in hand paid by the said C. D., at the time of the aforesaid sale, and by virtue of the statute in such case made and provided,

have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said C. D., his heirs and assigns, the ———. [*Here follows the description.*] To have and to hold, unto him, the said C. D., his heirs and assigns, forever; subject, however, to all the rights of redemption provided by law. In witness whereof, I, A. B., sheriff as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name, and affixed my seal, this ——— day of ——— 18—.

—————, Sheriff.”¹

“Deeds executed by the sheriff, as aforesaid, shall be *prima facie* evidence, in all controversies and suits in relation to the right of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts:

1. That the land conveyed was subject to taxation at the time the same was advertised for sale, and had been listed and assessed in the time and manner required by law.

2. That the taxes were not paid at any time before the sale.

3. That the lands conveyed had not been redeemed from the sale at the date of the deed. And shall be *conclusive evidence* of the following facts:

1. That the land was advertised for sale in the manner, and for the length of time required by law.

2. That the land was sold for taxes as stated in the deed.

3. That the grantee in the deed was the purchaser.

4. That the sale was conducted in the manner required by law; and in controversies and suits involving the title to land claimed and held under and by

¹ Sec. 42.

virtue of a deed executed by the sheriff as aforesaid, the person claiming title adverse to the title conveyed by such deed, shall be required to prove, in order to defeat the said title, either that the said land was not subject to taxation at the date of the sale—that the taxes had been paid—that the land had never been listed and assessed for taxation, or that the same had been redeemed according to the provisions of this act, and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of the State; but no person shall be permitted to question the title acquired by a sheriff's deed, without first showing that he or she, or the person under whom he or she claims title, had title to the land at the time of the sale, or that the title was obtained from the United States or this State after the sale, and that all taxes due upon the land have been paid by such person, or the person under whom he claims title as aforesaid.”¹

“The books and records belonging to the office of the clerks of the county commissioners' courts, and the clerks of the circuit court, or copies thereof, certified by clerks of either of the courts aforesaid, shall be deemed sufficient evidence to prove the judgment and sale of any land for taxes, or the redemption of the same, or the payment of taxes thereon.”²

“Persons paying taxes upon lands advertised for sale for taxes, or after judgment has been obtained, and previous to sale, shall be required to pay the cost of suit, and of advertising the same, and all other costs which may have accrued on said land under the provisions of this act, up to the time of such payment.”³

¹ Sec. 43.

² Sec. 44.

³ Sec. 46.

In construing this statute, the Supreme Court have arrived at the following conclusions:

First. That in order to confer jurisdiction upon the court, it is essential that the collector should, 1. Make the report required by section twenty-five; and, 2. Give notice of the application for judgment as prescribed in section twenty-six. The report and notice are the foundation of the whole proceeding, and without them the court would have no authority to enter a judgment upon the delinquent list.¹

Second. The report of the collector must *substantially* comply with the form prescribed by section twenty-five, or it will be void, and the court acquire no jurisdiction to render judgment upon it. Thus, in *Pickett v. Hartsock*,² a report in the following form was held void: "State of Illinois, Greene County, collector's office, August 8, 1843. To the Honorable Judge of the Circuit Court of Greene County: The collector of public revenue do ask of your Honor judgment on the following lands and town lots, situated in said county, for the year 1842: J. Valentine, 80 acres, E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ 33, 11, 10, valuation \$320, tax \$1.44, costs 22 cents. David Pinkerton, collector of Greene County." This report, it will be seen, does not purport to follow the statute form; and it is nowhere stated for what year the taxes were assessed. The court therefore held it insufficient "to invest the circuit court with jurisdiction." However, *formal* defects in the report will not affect the jurisdiction of the court. In *Spellman v. Curtenius*,³ the concluding words of the caption, viz: "for the year herein set

¹ *Atkins v. Hinman*, 2 Gilm. R. 437; *Chestnut v. Marsh*, 12 Ill. R. 173; *Spellman v. Curtenius*, Ibid. 409; *Pitkin v. Yaw*, 13 Ibid. 251; *Manly v. Gibson*, 14 Ibid. 136.

² 15 Ill. R. 279.

³ 12 Ill. R. 414.

forth," were omitted, and in lieu thereof, the words "for the year 1843," were inserted; and at the foot of the report it was stated that the costs upon each tract of land and town lot, which had then accrued, were ten cents, instead of inserting the amount in a column of the report, as indicated by its form; yet the judgment was held valid. By the court: "When the court has before it a collector's report properly headed, giving a description of the land, the amount of taxes due upon it, and for what year, a case is presented authorizing the court to act, if the proper notice has been given." In the same case, it was objected that the amount of costs was not correctly stated in the report; but the court replied: "This is immaterial, as it does not go to the jurisdiction of the court to enter a judgment. It might be cause for reversing a judgment on a direct proceeding, by appeal, or writ of error, but cannot be made a question where the judgment comes collaterally in issue."

The twenty-fifth section of the above recited act, was amended by the act of February 1, 1840,¹ requiring the collector to make his report at least five days before the term of the court at which he applied for judgment. Where the judgment is silent as to the day when the report was made, it will be presumed to have been made in conformity with the statute, and where the requirement has been disregarded, it has been held directory. The jurisdiction of the court does not depend upon a literal compliance with this provision; it is sufficient if made before the sitting of the court, or on the day of the commencement of the term.² The report need not

¹ Sec. 4.

² *Atkins v. Hinman*, 2 Gilm. R. 450; *Jackson v. Cummings*, 15 Ill. R. 449.

show upon its face that a demand was made of the tax, and that the owner of the land had no goods and chattels; it is sufficient if made in the form prescribed by the statute, in which case, the demand, and fact that no goods could be found, will be presumed.¹

Third. It will be perceived that section forty-three does not make the deed conclusive (or even *prima facie*,) evidence that due notice of the application for judgment had been given, but simply "that the land was advertised *for sale* in the manner and for the length of time required by law." The consequence is, that the jurisdiction of the court, as far as it depends upon the publication of the notice prescribed in section twenty-six, is open to attack. The recital in the form of the judgment,² "And whereas, due notice has been given of the intended application for judgment," is *prima facie* evidence of this jurisdictional fact. This was the evidence of jurisdiction in *Chesnut v. Marsh*,³ although the report of the case is imperfect in this respect. Of course it may be impeached, and this was attempted in *Jackson v. Cummings*.⁴ The question there made, was as to the sufficiency of the certificate of publication required by section twenty-seven. The advertisement consisted of the usual caption, the list of lands, &c., the notice of the intended application for a judgment, and the time and place of sale, followed by a certificate of the printer, "that the *foregoing* was duly published on the 15th January, 1845, in the 'Peoria Democratic Press,' published in Peoria county, Illinois, and that the number of transcripts so published, corresponds with

¹ *Taylor v. People*, 2 Gilm. R. 349; *Job v. Tebbets*, 5 Ibid. 382.

² Sec. 29.

³ 12 Ill. R. 173.

⁴ 15 Ill. R. 449.

the number of newspapers printed and distributed for that week." The objections to this certificate were, 1. That it did not appear that the "Press" was a *newspaper*, that it might be a book, a monthly periodical, or a handbill. 2. That the words, "number of transcripts so published," might refer to other advertisements of copies, and not to the tax list. To which the court reply: "We may read the advertisement and certificate so, as critical scholars, but knowing the statute under which such publications are made, every one, lettered or unlearned, would understand its proper connections, meaning and object." In this case, the following abbreviations in the advertisement itself, were sanctioned by the court, upon the authority of the cases cited in the margin,¹ viz: "\$," for dollar, "c." "ct." "cts." for cent or cents, "m." for mills, "Lt." for lot, "Bk." for block, "Tx." for tax, "Vl." for valuation, "T." for township, "R." for range, "Sec." for section, "qr. sec." for quarter section, and "pt." for part, &c.

Fourth. The *form* of the judgment is prescribed in section twenty-nine. Where it has been departed from, the courts have sustained the judgment, upon the principle, that when it has been rendered by a tribunal of competent jurisdiction, it must be regarded as valid in all collateral actions, however erroneous it may be; that no irregularity or informality can justify a court in pronouncing it void.² Perhaps the strongest case illustrative of this rule, is that of *Chesnut v. Marsh*.³ The judgment in that case

¹ *Goodale v. Harrison*, 2 Missouri R. 124; *Long v. Long*, 2 Blackf. R. 293; 18 Vermont R. 293; *Atkins v. Hinman*, 2 Gilm. R. 444; *Blakeney v. Bestor*, 13 Ill. R. 714; Rev. Stat. Ill. 1845, p. 446, sec. 62.

² *Chesnut v. Marsh*, 12 Ill. R. 173; *Atkins v. Hinman*, 2 Gilm. R. 437; *Merritt v. Thompson*, 13 Ill. R. 716.

³ 12 Ill. R. 173.

read thus: "It is considered and adjudged by the court, that the State of Illinois do severally recover of the several *owners* of the lands, described in the report and list aforesaid, the taxes due upon each of said lots of land, being the same set down in figures opposite to each lot of land, together with the interest and costs due thereon, and the costs of this proceeding; and it is further considered and adjudged *that each of said lots of land* described in the list aforesaid, or so much thereof as will be sufficient, be sold to satisfy and pay *this* judgment and the costs of sale, and *this judgment is to be entered as a several judgment* against the *owner* of each lot of land described in the report and list, and the *land itself*, for the taxes, interest and costs due upon the same." This was a gross departure from the form prescribed by the statute, and was, in reality, a judgment against the owners, with an award of execution against their land to satisfy it, with a direction to the clerk to enter it up as a several judgment against the owner, and the land. The statute contemplated a judgment *in rem*.¹ This was a judgment *in personam*, and to that extent at least, was conceded to be void. Three questions arose upon these facts. 1. Is the judgment rendered void because of the fact that it does not pursue the statute form? 2. Is it void as a judgment against the land, (if it can be so regarded,) simply because it is confessedly void as to the owners? And 3. Is it not substantially a judgment against the land? The first and second questions were answered in the negative, and the latter in the affirmative, by a majority of the court, Judge Trumbull dissenting. The reasoning of the court was, that a judgment could not

¹ *Olcott v. State*, 5 Gilm. R. 481.

be impeached collaterally, however informal or irregular; that this was substantially a judgment *in presenti* against the land, and not a mere direction to the clerk to enter up one in the *future*; and that, inasmuch as no effort was made to enforce it as a judgment *in personam*, but against the land alone, that part which affected the owners might be treated as surplusage. In *Atkins v. Hinman*,¹ the judgment did not recite the day of the date of the collector's return, and omitted the words "and that the taxes thereon remained due and unpaid, on the day of the date of the said collector's return." Both of these recitals are contained in the statute form of the judgment. With these exceptions the form was strictly pursued. Besides, the report, which was in the form prescribed by law, was copied into the judgment, and thus became a part of it. The judgment was sustained upon two grounds. 1. That inasmuch as the jurisdictional facts appeared upon the face of the record, the omissions and variations in matters of form, were evidently clerical mistakes, which ought not to vitiate the judgment. 2. That the omitted facts in the formal parts of the judgment, clearly appeared in the collector's report, which was a part of the judgment record, and this was equivalent to a direct recital.

The judgment cannot be attacked and impeached collaterally, because the costs are improperly taxed, whether they are greater or less in amount than permitted by law.² A judgment for the amount of the tax, and *generally* for the costs, as in ordinary

¹ 2 Gilm. R. 437.

² *Spellman v. Curtenius*, 12 Ill. R. 414; *Merritt v. Thompson*, 13 Ibid. 723.

judgments, is sufficient.¹ So, where the amount of the costs is stated at the bottom of the collector's report, and immediately preceding the concluding part of the judgment order, the judgment is valid.² The law does not require that the judgment should state the name of the patentee, or present owner, the valuation of the land, the county where it is situated, or the year for which the tax is due, consequently their omission is immaterial.³

On the other hand, it was held in *Pickett v. Hartsock*,⁴ that a judgment rendered for taxes, on a day prior to the day named in the notice of the collector, is void. In that case, the notice stated that the collector would apply for judgment, on the first Monday of April, which was the seventh day of that month. The judgment was rendered April 4. Treat, C. J. "The tax judgment of April 4, 1845, was clearly void. It was rendered prior to the day named in the notice of the collector. The action of the court was premature and unauthorized. It had no jurisdiction over the case before the 7th of April. Up to that day, owners had the right to pay the taxes charged against their property, or to make preparation to resist the application for judgment." So, where the judgment record fails to show upon its face, the term and day when it was entered, it is a nullity, and cannot be aided by oral evidence. Thus in *Young v. Thompson*,⁵ the facts were that the tax deed recited a judgment rendered at the May term, 1848; the precept bore date May 22, but the record of the judgment was silent as to when it was entered up, but showed that it was rendered for the unpaid

¹ *Merritt v. Thompson*, 13 Ill. R. 723-5.

² *Merritt v. Thompson*, *Ibid*.

³ *Spellman v. Curteneus*, 12 Ill. R. 412.

⁴ 15 Ill. R. 279.

⁵ 14 Ill. R. 380.

taxes of 1847; the book in which judgments against delinquent lands were recorded, showed on inspection, that the judgment immediately *preceding* the one in question, was upon the tax lists of 1845 and 1846, but was also silent as to the time of its rendition; and the caption of the *succeeding* judgment showed that it was rendered at the May term, 1849, on the list of 1848. The general record of the court showed that the court held its regular term in May, 1848; and it further appeared that the precept upon the judgment in question was issued within five days after the rendition of the judgment, as required by law, but this information was derived from an entry of the clerk at the foot of the judgment, and was no part of the record authorized by the statute. The judgment to be valid, must have been rendered at the May term, 1848. Treat, C. J. "In our opinion, there was no legitimate evidence in the case to show that it was rendered at that time. It certainly did not appear of record, at what time the judgment was entered. This presented a fatal objection to the plaintiff's title. The rule is, that a record imports absolute verity, and must be tried by itself. If deficient or imperfect, it cannot be aided by evidence *dehors* the same.¹ This record failed to show such a judgment as was described in the sheriff's deed, and the deed must fall for the want of a foundation upon which to rest."

The description of the land contained in the judgment must be so certain that a definite locality can be given to it, or it will be void.² But words, figures and abbreviations may be used for the purpose of

¹ Com. Dig. Tit. Record, B. and E.; *Crowell v. Byrnes*, 9 John. R. 287; *Elliot v. Pierson*, 1 Peters' R. 328; *Lessee of James v. Stokely*, 1 Wash. C. C. R. 330.

² *Olcott v. State*, 5 Gilm. R. 481.

designation.¹ Examples of this rule will be found in the cases cited in the margin.² To authorize a judgment against several distinct parcels of land, for one aggregate sum of money, the lots must constitute one entire block or tract.³

Fifth. The precept which issues upon the judgment must substantially conform to the requirements of the law, or it will be treated as a nullity. In addition to section thirty-one, as herein before set forth, the ninth section of the act of February 1, 1840, provides, that "so much of the thirty-first section of the act to which this is an amendment, as requires the clerk of the circuit court to furnish a copy of the collector's report to the sheriff, be, and the same is hereby repealed."⁴ This repealing clause was itself repealed March 6, 1843, and the provision, requiring a copy of the collector's report to be delivered to the sheriff, re-enacted.⁵ In *Hinman v. Pope*,⁶ a judgment in the form prescribed was read in evidence, without objection. A precept was then offered and rejected, which was in this form, viz:

"List of lands and other real estate, situated in the County of Brown, and State of Illinois, on which taxes remain due and unpaid for the years herein set forth.

Names of the Patentees.	Present Owners.	Year for which the tax is due.	Description.	Valuation.	Tax	Cost.	County.
Gideon Brunk,		1839	160, N. E. 22, 1 S., 4 W.	\$1120	560	16	Brown.
Andrew Gerald,		1840	160, N. E. 30, 1 N., 2 W.	\$640	448	16	do.

¹ *Olcott v. State*, 5 Gilm. R. 481.

² *Hinman v. Pope*, 1 Gilm. R. 133; *Atkins v. Hinman*, 2 Ibid. 443; *Spellman v. Curtenius*, 12 Ill. R. 410.

³ *Pitkin v. Yaw*, 13 Ill. R. 251; *Spellman v. Curtenius*, 12 Ibid. 409; *Atkins v. Hinman*, 2 Gilm. R. 437.

⁴ Laws 1840, p. 5. ⁵ Laws 1842-3, p. 237, sec. 28. ⁶ 1 Gilm. R. 131.

The foregoing is a correct list of taxable property, upon which taxes remain due and unpaid for the years 1839 and 1840, in Brown County, State of Illinois, March 24, 1841.

THOMAS S. BROCKMAN, *Collector*
of Brown County, Illinois.

State of Illinois, }
Brown County, } ss. *The People of the State of Illinois*
to the Sheriff of said County, greeting:

You are hereby commanded to sell so much of the foregoing tracts of land as shall be sufficient to satisfy the tax, interest and costs on each lot, set opposite said lot, in the foregoing list, and make due returns of your doings, according to law.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the Brown
[L. s.] Circuit Court, at Mt. Sterling, this 20th day of April, A. D., 1841.

JAMES BROCKMAN, *Clerk."*

It will be perceived, on a comparison of this document with the thirty-first section of the act of 1839, that it does not conform to the requirements of that section, which requires the clerk to make out, under the seal of the court, a copy of the collector's report, together with the order of the court thereon, and deliver the same to the sheriff, &c. It does not recite that any judgment had ever been rendered by the court. It is a mere mandate of the clerk to sell certain tracts of land for taxes, to be found in a collector's list appended to the paper. An execution, to be valid, must show on its face that such a judgment has been rendered by a competent court, as will justify its emanation. It was contended that the repealing clause in the act of February 9, 1840,

made the precept in this case, valid, but the court held that the only effect of this clause, was to dispense in the precept with the collector's report, but that in all other respects the process must conform to the requisitions of the thirty-first section of the act of February 26, 1839, which required the precept to consist of a copy of the judgment, certified under the seal of the court; whereas, in this case, the precept did not purport to be such copy, either in form or substance.

In the case of *Job v. Tebbetts*,¹ the validity of the precept depended upon the construction of the thirty-first section of the act of February 26, 1839, and the ninth section of the act of February 1, 1840, which latter dispensed with a copy of the collector's report. The facts were, that the clerk copied and authenticated the judgment order, and delivered it to the sheriff, but omitted the list and description of the lands against which the judgment was pronounced. It was insisted by the counsel opposing the title derived under this precept, that the judgment, according to the form prescribed in section twenty-nine, contained the list of lands, and that a copy of the judgment order would necessarily contain it also, and that the ninth section of the act of February 1, 1840, evidently intended to dispense with a copy of the collector's report, otherwise a delivery to the sheriff of two complete lists of the lands against which judgment was pronounced, would be required, one of which would be utterly useless, and be attended with much expense. The court however held, that although the question was not free from difficulty, the construction contended for

¹ 5 Gilm. R. 380.

was not admissible; that under the law of 1839, but one list was necessary, and that was dispensed with by the act of 1840, and consequently the precept should not recite the lands embraced in the report and judgment, but consist simply of a copy of the order of the court, duly certified under the seal of the court.

Since, however, the passage of the act of March 6, 1843, which restored the old law of 1839, *the list of lands, AND the order of the court thereon, are essential to the validity of the precept.* The copy of the order of sale was intended to notify the sheriff that the court had entered a judgment for the sale of the lands reported, while the copy of the collector's report was designed to apprise him what land he should sell.¹ The form of the precept under this ruling, will be found in *Atkins v. Hinman*.² In *Manly v. Gibson*,³ it was held that where the list of lands embraced in the collector's report, was delivered to the sheriff, with the order of the court thereon, duly authenticated, the precept was sufficient, though the formal parts of the collector's report were omitted. Those omissions and informalities in the judgment which do not render it void, will not invalidate the precept, because the latter is a mere copy of the former;⁴ nor will a clerical mistake in the recital of the time when the collector made his report, render the precept void.⁵ And it has also been decided that the precept is not a "writ or process," within the meaning of the constitution, which requires all process, &c., to run in the name of the "People of the State

¹ *Job v. Tebbets*, 5 Gilm. R. 382.

² 2 Gilm. R. 444-5.

³ 14 Ill. R. 137.

⁴ *Chesnut v. Marsh*, 12 Ill. R. 173; *Atkins v. Hinman*, 2 Gilm. R. 451.

⁵ *Chesnut v. Marsh*, 12 Ill. R. 173.

of Illinois.”¹ A material variance between the precept and judgment upon which it is based, is fatal to its validity. Thus in *Pitkin v. Yaw*,² where the judgment was for 99 cents, and the precept recited a judgment for \$1.25, it was held to be a material, and therefore fatal, variance. The precept described a judgment more than one-fourth larger than the one actually rendered. Trifling variances may be disregarded, but one which destroys the legal identity of the proceedings, cannot be sustained.

Sixth. In the construction of this statute it is held, not only that the judgment and precept are essential to the validity of a sale for taxes, but that the burden of proving their existence rests upon the purchaser, or those claiming under him; the court holding the analogy between these and ordinary sheriff's sales, complete in this respect.³

Seventh. The deed must substantially conform to the requisitions of the forty-second section of the statute, wherein the form is set forth. It must recite the judgment, precept, sale and expiration of the time of redemption. If any material variances exist between the facts and the recitals in the deed, or if it substantially departs from the statute form, it will be treated as void, and cannot be read in evidence. The statute expressly declares that “deeds executed by the sheriff, AS AFORESAID, shall be” *prima facie* evidence of some, and *conclusive* evidence of other facts, *particularly enumerated* in section forty-three. It surely was never intended to give to the deed a conclusive effect against the rights of a third person, when the

¹ *Curry v. Hinman*, 11 Ill. R. 420; *Scarritt v. Chapman*, Ibid. 443.

² 13 Ill. R. 251.

³ *Hinman v. Pope*, 1 Gilm. R. 131; *Atkins v. Hinman*, 2 Ibid. 437; *Spellman v. Curtenius*, 12 Ill. R. 409; *Pitkin v. Yaw*, 13 Ibid. 251.

officer contemns the very authority under which he acts, and disregards the plain requirements of the law which is his only guide in the execution of the deed. In *Pitkin v. Yaw*,¹ where the judgment was against eight lots, and the deed recited a judgment against and a sale of two only, the variance was held fatal, and the deed inadmissible in evidence.

Eighth. The party claiming title under the tax sale, makes out a *prima facie* case, by producing, 1. The judgment of a court of competent jurisdiction; 2. A valid precept issued thereon; and, 3. A sheriff's deed made in conformity with the law. The presumption then arises, that all of the requisitions of the law have been complied with, by all of the officers who had anything to do with the proceedings, and the *onus probandi* is thrown upon the party contesting the validity of the tax title.²

Ninth. Section forty-three declares that "no person shall be permitted to question the title acquired by a sheriff's deed, without first showing that he or she, or the person under whom he or she claims title, had title to the land at the time of the sale, or that the title was obtained from the United States or this State after the sale, and that all taxes due upon the land have been paid by such person, or the person under whom he claims title as aforesaid." In construing this section, it has been decided substantially, 1. That any one may attack the validity of the judgment, precept and deed, without putting himself "in position," as it is called. 2. But if, after the person claiming under the tax title, has made out a *prima facie*

¹ 13 Ill. R. 251.

² *Manley v. Gibson*, 14 Ill. R. 136; *Lusk v. Harber*, 3 Gilm. R. 158; *Hinman v. Pope*, 1 Ibid. 131; *Atkins v. Hinman*, 2 Ibid. 437.

case by showing a valid judgment, precept and deed, the adverse party desires to question the *prima facie* title thus established, he must prove title to the land at the time of the sale, and the payment of taxes as required by this section.¹ Proof that the party contesting the tax sale was in possession, claiming title to the land at the time of the sale, is sufficient evidence of title within the meaning of this statute.² And if it appears that no taxes are due to the State upon the land, this satisfies the other requirement of the statute, although the taxes were not paid by the party who desires to contest the validity of the tax title.³

Tenth. Where the party resisting the validity of the tax sale has thus put himself "*in position*," he may defeat the sale by establishing these defenses: 1. That the land was not *subject to taxation* at the date of the sale;⁴ 2. That the taxes, for which the land was sold, had been paid;⁵ 3. That the land was not listed and assessed in the time and manner required by law;⁶ 4. That the sale had been redeemed from;⁷ 5. That the sale was made on a day different from that designated in the notice, or the law;⁸ and 6. The party may go behind the judgment and show that any of the material prerequisites of the law have not been complied with.⁹ There are, doubtless, other

¹ *Hinman v. Pope*, 1 Gilm. R. 138; *Bestor v. Powell*, 2 Ibid. 119; *Atkins v. Hinman*, Ibid. 453-4; *Lusk v. Harber*, 3 Ibid. 158; *Curry v. Hinman*, 11 Ill. R. 420; *Spellman v. Curtenius*, 12 Ibid. 409; *Hope v. Sawyer*, 14 Ibid. 254.

² *Lusk v. Harber*, 3 Gilm. R. 158; *Curry v. Hinman*, 11 Ill. R. 420.

³ *Curry v. Hinman*, 11 Ill. R. 420; *Hope v. Sawyer*, 14 Ibid. 254.

⁴ Sec. 43.

⁵ Sec. 43; *Curry v. Hinman*, 11 Ill. R. 420.

⁶ *Chemut v. Marsh*, 14 Ill. R. 223; *Billings v. Detton*, 15 Ibid. 218.

⁷ Sec. 43; *Chapin v. Curtenius*, 15 Ill. R. 432.

⁸ *Hope v. Sawyer*, 14 Ill. R. 224; *Polk v. Hill*, 15 Ibid. 130.

⁹ *Lusk v. Harber*, 3 Gilm. R. 161-2.

defenses which may be successfully made to a tax sale under this statute, but no decisions have settled them, and it is unnecessary to anticipate the action of the courts. It is proper to add in conclusion, that the laws of Illinois, now in force, are substantially like the act of 1839, and their construction is governed by the same principles laid down in this chapter.

CHAPTER XII.

OF THE ADVERTISEMENT OF THE TIME AND PLACE OF SALE.

THE maxim is familiar, "That notice is of the essence of things required to be done."¹ And it is a fundamental rule, that in all judicial, or *quasi* judicial proceedings, affecting the rights of the citizen, he shall have notice and an opportunity of a hearing before the rendition of any judgment, decree or order against him. In other words, he must be warned, and have his day in court. And in the application of this rule, it is immaterial whether the tribunal exercising authority over his rights proceeds regularly or summarily—according to the due course and process of the common law—or in pursuance of a general or special statute. It would be a violation of one of the first principles of justice and judicial proceedings, to try, and decide upon, the rights of an individual, civilly or criminally, without notice, and consequently an opportunity of defending himself. So strict is the rule, that where a proceeding of a judicial nature is authorized, and the statute is silent as to notice, the adjudication will be void unless no-

¹ 1 Burr R. 447 ; 3 Denio R. 595.

tice is given to the party in interest.¹ Where the proceeding is before a special tribunal, exercising a summary authority, contrary to the course of proceeding in the common law courts, the evidence that due notice was given must indisputably appear upon the face of the record. Even a recital of the notice is insufficient; it must be set forth at large in the record, that it may be seen on inspection whether the notice was legal and sufficient.² If such is the law of notice in judicial proceedings, it applies with much greater force to the exercise of ministerial power, where the act is not only *summary*, but the notice merely *constructive*; where the proceeding is in the nature of a judgment, and terminates in the divestiture of the title to real estate.

The law in relation to sheriffs' sales would seem to be an exception to this principle. An advertisement of the time and place of sale is usually required, but in this respect the statute is regarded as merely directory to the officer. Without doubt, it is his duty to comply with its directions; and for a breach of his duty, he would be responsible to the injured party, but such a breach of duty is not in itself, sufficient to avoid the sale. In such cases, the sheriff derives his authority from the judgment and execution, and not from the advertisement. Besides, the debtor, having been regularly brought into court by the service of process, is bound to take notice of all the subsequent proceedings in the cause, particu-

¹ *Chase v. Hathaway*, 14 Mass. R. 222; *Eddy v. People*, 15 Ill. R. 386; *Hollday v. Swailes*, 1 Scam. R. 515; *Shumway v. Shumway*, 2 Vermont R. 339; *Smith v. Burlingame*, 4 Mason R. 121; *Corliss v. Corliss*, 8 Vermont R. 389; *Kinderhook v. Claw*, 15 John. R. 537; *Brown v. Wheeler*, 3 Ala. R. 287; *State Bank v. Marsh*, 2 Eng. R. 390; *Owners v. Mayor of Albany*, 15 Wend. R. 374.

² *Rex v. Croke*, 1 Cowper R. 26; *Cheatham v. Howell*, 6 Yerger R. 311; *Gwin v. Van Zant*, 7 Ibid. 143.

larly in reference to the execution, which, to use the language of Lord Coke, is the "life of the law."¹ But even in this case, if the purchaser is aware of the fact that the officer has failed to advertise the sale, in conformity with the requirements of the law, the sale may be avoided. This would amount to a constructive fraud. It is only *bona fide* purchasers who are protected in this class of cases, and not those who have actual notice of a substantial irregularity.² Such is the law of notice in sheriffs', and indeed, in all sales made under the authority of a judgment, order, or decree. But it seems to have been an universal principle in the legislation of this country relative to compulsory taxation, that a notice of the time and place of selling the land of a delinquent, shall be given by publication in one or more newspapers of the State or county in which the proceeding takes place, by recording the list, or posting notifications in some public place. There is less uniformity, however, in the details of the various statutes, regulating the form and contents of the notice, the time of publication, the number of newspapers in which it shall be inserted, the number of issues which shall contain it, the circulation of the paper, and the mode of proving and perpetuating the fact of publication. It may, however, be laid down as a general rule, that the advertisement of the sale, in the time and manner prescribed by the law, is a prerequisite to the validity of a tax title. The officer derives his power of sale, in part, from the advertisement of it. Power is conferred upon him

¹ *Minor v. Natchez*, 4 S. and M. 602; S. C., 10 Ibid. 246; 2 Bibb R. 401; 3 Ohio R. 187; 9 Ibid. 19.

² *Hayden v. Dunlap*, 3 Bibb R. 216; *Webber v. Cox*, 6 Munroe R. 110.

to be exercised on certain contingencies, and these contingencies must have happened, and the conditions on which he can act, must have been performed, before his act can be valid. His power does not attach until every prerequisite of the law has been complied with. One object of advertising tax sales is to give full notice to the proprietor, and furnish him with every facility for the voluntary payment of the tax, before a resort is had to coercive means; and another, equally beneficial to him, is to create competition at the sale, and prevent his entire estate from being sacrificed for a trifling sum compared with its real value, when the sale of a less quantity might have been made, if a spirited competition had existed. The longer the notice is published, the wider the circulation of the paper, and the more full the information conveyed in the advertisement, so much greater will be the competition at the biddings. It follows that any neglect of the officer, which deprives the owner and bidders of that full information which the law intended to give them, is fatal to the validity of the tax sale. These principles are fully sustained by the authorities.¹

¹ *Parker v. Rule's Lessee*, 9 Cranch R. 64; *Williams v. Peyton*, 4 Whea. R. 77; *Garrett v. Wiggins*, 1 Scam. R. 335; *Fitch v. Pinckard*, 4 Ibid. 69; *Ronkendorff v. Taylor*, 4 Pet. R. 349; *Pope v. Headen*, 5 Ala. R. 433; *Hughes v. Horrell*, 2 Ham. R. 232; *Moulton v. Blaisdell*, 24 Maine R. 283; *Brown v. Veazie*, 25 Ibid. 359; *Farnam v. Buffum*, 4 Cushing R. 260; *Nalle v. Fenwick*, 4 Randolph R. 594-5; *Kinney v. Beverly*, 2 Hen. & Munf. R. 318, 344; *Lessee of Holt v. Hemphill*, 3 Ham. R. 232; S. C., 1-4 Ohio Cond. R. 551; *Allen v. Smith*, 1 Leigh R. 231; *Wister v. Kammerer*, 2 Yates R. 100; *Luffborough v. Parker*, 16 S. & R. 351; *Delogny et al. v. Smith et al.*, 3 Lou. R. 418; *Early v. Doe*, 16 Howard U. S. R. 610; *Games v. Stiles*, 14 Pet. R. 322; *Minor v. Natchez*, 4 S. & M. 602; S. C., 10 Ibid. 246; *Washington v. Platt*, 8 Whea. R. 681; *Lafferty's Heirs v. Byers*, 5 Ham. R. 457; *Thompson v. Gotham*, 9 Ohio R. 170; *Lessee of Wilkins' Heirs v. Huse and Swindler*, 10 Ibid. 139.

A different rule prevailed in North Carolina at one time. Their statute required notice of the sale to be published in the State Gazette, and by posting

A particular examination of the cases, in which these principles have been applied, will show how

a copy at the door of the court house, in the county where the land lay. In *Stanley v. Smith*, (1 Car. Law Repository, 511, Bat. Ed. 124,) where the question was as to the *onus probandi*, Hall, J., in delivering the opinion sustaining the sale, says: "In both cases it is made the duty of the sheriff to advertise; but few persons would become purchasers if it was incumbent on them to prove that the sheriff had done his duty in that respect. We think it better to say, that as the law has made it his duty to do so, persons who bid for the land, may take it for granted that he has discharged that duty,—otherwise they would be deterred from bidding, and the mischief to owners of land so sold, would be greater, we apprehend, than would be experienced by not imposing the burden of proof upon purchasers." And in *Martin v. Lucey*, (1 Murphy R. 311,) the plaintiff claimed under a grant, and the defendant under a tax sale. The case came before the Court upon this question: "Whether the defendant was bound to show any other evidence of title than the tax deed, &c." The law of 1796, provided, "that it shall not be lawful for any of the sheriffs in this State, either by themselves or deputies, to sell lands for taxes, until the same hath been first advertised for sale in the North Carolina Journal, the State Gazette, and Fayetteville Minerva, for the space of one month, and also in the county in which they are situated, in manner as heretofore required by law; which advertisement shall mention the situation of the lands, the streams near which they lie, the estimated quantity, the names of the tenants, the reputed owners, &c." And the law of 1792, further provided, that "such conveyance shall be good and valid in law, the land so sold, being first advertised for such length of time as is required in cases of execution." The court answered the question certified, in the negative. Wright, J., "It is believed that this act (1796,) was intended to impose additional duty on the sheriffs, and that the provisions of this, as well as the other act, (1792,) are merely directory to them of their duty; and that, although a failure in the performance of any part of it, might subject them to an action, in which they would be compelled to indemnify the owner of any land which might be irregularly sold, to the extent of the injury sustained by such sale, yet it ought not to destroy the title of the purchaser, who has the right to presume that a public officer, known to possess the power to sell, has taken every previous step required of him by the law under which he sells. This construction appears to be in conformity with the decisions in cases of sales made of land by sheriffs, under writs of execution, which are analogous in principle, to cases of sales for the non-payment of taxes, &c. To require proof of the advertisement would so embarrass sales of this kind, and throw so many difficulties in the way of persons willing to bid a fair price for the land, that they would not be willing to purchase; for it would not only be necessary to prove these facts on any particular occasion, but they must preserve the evidences of them with their titles, to be used at any distant period, whenever these titles might be made the subject of controversy. The consequences would be, that not only the difficulty of collecting the public revenue would be increased, but the land would become a subject of speculation merely, to those who would, by purchasing at very reduced prices, be

rigid the courts are in requiring a strict compliance with the requirements of the statute in this particular.

1. The advertisement is an official act, and to be valid, must be published by the officer to whom the duty has been assigned, and purport upon its face to be his official act, and be attested by his official signature. It has been shown in a subsequent chapter that the act of an officer *de facto* is valid. This rule will undoubtedly apply to the publication of the delinquent list, though it has been held that where an advertisement bore date June 7, and it appeared that the collector, who caused its publication, was *not sworn* until three days thereafter, the sale was void.¹ It must appear on the publication, by what power, and in what capacity the person acts; and where the official character of the person was omitted, and the advertisement did not purport upon its face in any other manner to be an official act, the court held the

willing to encounter the inconveniences and risks of purchases under these embarrassing circumstances." The argument of M'Bryde, counsel for the defendant, will throw some light upon the temper of the times in which these decisions were made, and the history of the tax laws of North Carolina. In commenting upon the two statutes above referred to, he remarks: "These acts were intended for salutary purposes, and should receive a liberal construction. After every precaution has been taken, and the greatest exertions of legislative prudence and foresight have been exercised, the revenue laws of the State are still evaded. They have been enacted from time to time to prevent very general and growing mischief. In the year 1792 it was found necessary to subject lands for sale for the taxes due thereon. It is well known that large tracts of land were owned by persons resident in other States, and in many instances by foreigners. Those persons had no personal property in the counties where the lands were situate. It was therefore necessary for the legislature either to abandon the land tax, or to adopt such measures as would enforce its payment. The revenue laws of every country must be strict; they must be fully and faithfully executed, even if they should produce occasional hardship and inconvenience, otherwise they will never answer the purpose for which they were intended." In one case, *one million and seventy-four thousand acres* of land were sold, in a body, to satisfy the tax. (*Love v. Wilbourns*, 5 Iredell R. 344.)

¹ *Langdon v. Poor*, 20 Vermont R. 13.

sale void. The court said: "The advertisement in this case was not signed by Spaulding *as collector*, nor did it in any way so import, and the landholders were therefore no way informed that the signer of that advertisement had any more right than any other man to give such notice, nor that he had such power as he undertook to exercise. It is not true that *every* man is presumed to be clothed with and to be exercising an official authority, because it seems to be needed for what he is attempting. Such a principle would sweep away all official signatures and designations. Every known public officer must add his official signature to every official document. Besides, in this case, the statute form contained such official designation, and its omission is fatal. The form in such cases must be strictly followed."¹ While the law is thus rigid in requiring that the publication should, in fact, be an official act, and so purport upon its face, slight variances between the real and published name of the officer, are regarded as immaterial. Thus, in *Isaacs v. Wiley*,² where the name of the collector appointed was Luther H. Brown, and the name attached to the advertisement was Luther W. Brown, the advertisement was held valid, the court saying: "In the absence of proof that two persons bearing the same name, and distinguished by these initial letters, reside in the region where the appointment was made, it certainly requires a very great stretch of credulity to admit the construction that one man was appointed to this office, and that another intruded himself into his place, and assumed the burden of his duties. We think it more rational

¹ *Spear v. Ditty*, 9 Vermont R. 282.

² 12 Vermont R. 674.

to treat the name as being the same, but capriciously varied to suit the taste or whim of the individual." This decision is in accordance with the general rule that the law recognizes but one christian name, and that the omission of, or variance in, the middle name of a person, is immaterial.¹

2. Where the law requires the publication to be made in the State paper, in the paper published in a particular county, or in a particular paper named in the statute, the advertisement must be so published, or it is a nullity. Though the reason of the law's preference may not appear, the letter of the law must be complied with. Probably the strongest case in support of this rule, to be found in the reports, is that of *Bussy v. Leavett*.² The law required a notice to be published, three months prior to the day of sale, by three successive weekly insertions in the newspaper of the public printer of the State. Two publications were inserted in the "Portland Advertiser and Gazette," which was the newspaper of the public printer; but before the third insertion, the legislature, by a resolve, declared it to be *no longer* the "State paper." The court decided the advertisement and sale founded on it to be illegal. But where the law required the notice to be published in the "*Vermont Republican*," (a paper bearing that title at the time of the passage of the statute being intended,) and the name of the paper was afterwards changed by the addition of the words "*and American Yeoman*," and the notice was published in the paper bearing the title thus changed, the advertisement was held valid, the court saying that "the *second* name of a newspaper is seldom, if ever, regarded in common parlance. But

¹ *Franklin v. Tallmadge*, 5 John. R. 84.

² 3 Fairfield R. 378.

the *addition* raises no doubt of the identity of the paper."¹ It would seem from this that newspapers and persons are placed on the same footing, as far as their names are concerned. The name of each is used for the purpose of designation only, and if the *identity* can be established, it is certain enough, though a variance may exist. It very often happens that a newspaper, after being published for a long series of years by the same proprietor, at the same place, and under the same name, is transferred to a stranger, the name changed, but its publication is continued, and the paper is still taken by the patrons of its predecessor. Now, if the legislature were to direct the publication of the tax list in the paper by its original name, and it was so published for several years after the passage of the law, and the name was then changed, under the circumstances above indicated, would there be any doubt of the legality of continuing the publication of the tax list in such paper? The spirit of the law would be complied with, and a failure of justice would take place if the right so to publish was denied.

3. It is also well settled that if the statute requires the advertisement to be inserted in several newspapers, published at different places, the notice is illegal unless inserted in all of the papers thus designated. Thus, the statute of Ohio required the county auditor to publish the delinquent list in some newspaper printed at the capitol of the State, and also in a newspaper printed in the county where the sale was to take place, or if no paper should be printed in that county, then in some newspaper having a general circulation in such county. It appeared

¹ *Isaacs v. Shattuck*, 12 Vermont R. 668.

upon the trial of a tax title acquired under this statute, that the notice was published in a newspaper at Columbus, the seat of government, *but in no other*. It further appeared that no paper was printed in the county where the sale was to take place, that the papers then published at Springfield and Chillicothe had a *partial* circulation in such county, but the Columbus papers had the most *general* circulation there. Objection being made to the sufficiency of the publication, the sale was held void. By the court: "It is contended that as there was no paper printed in the county, and as the Columbus paper was in general circulation in that county, it was not necessary to publish the notice in any other. The law does not admit of such construction. The publication must be made in two papers, one printed at Columbus, and the other in the county where the auditor resides, if there be such a paper, and if not, then in some paper, other than the one printed at the seat of government, in most general circulation in his county. The law was designed *to extend the notice as generally as possible*, for the information of owners, and for the purpose of increasing competition at the sale. This requisition of the law is substantial and useful, and cannot be dispensed with. Tax sales are attended with greater sacrifice to the owners of land than any others. Purchasers at these sales seem to have but little conscience. They calculate on obtaining acres for cents; and it stands them in hand to see that the proceedings have been strictly regular."¹

4. The statute usually requires a warrant to col-

¹ *Lessee of Hughey v. Horrell et al.* 2 Hammond R. 231; S. C. 14 Ohio Cond. R. 335.

lect, or the delinquent list to be delivered to the collector, which constitutes his authority to proceed ; and after the warrant or list comes to his hands, but before the advertisement is required to be made, the collector is directed to make a personal demand for the tax, and in default of payment, to arrest and imprison the body, or seize and sell the goods of the delinquent, and a time is usually limited within which the demand, arrest or seizure is to be made, and before which time has expired, the collector has no authority to advertise ; or a time is fixed by law when the advertisement must be made out by the collector and delivered to the printer for publication. The authority of the collector to advertise a sale of the land of the delinquent does not attach, until the time thus limited for the exercise of these collateral remedies has expired ; and if he proceed to advertise before the time fixed, the act is illegal, and the sale founded thereon void. The reason is apparent. The authority to proceed against the land depends upon the fact that the collateral remedies are unavailing, and this cannot be certainly known until the time has expired within which they may be pursued. Besides, the officer has no right to increase the burden of the delinquent by the costs of an advertisement until the law arms him with the power. The statute of New Hampshire required the collector on or before a particular day to make out and deliver to the deputy secretary of state, a copy of his tax list, which the deputy was to retain, and receive payment of the taxes for a limited time, when it was to be returned to the collector. It has been held, in construing this act, that until the redelivery of this

list, the collector has no authority to advertise and sell.¹

In Ohio, the county auditor has no power to advertise and sell until he has received from the state auditor a list of the forfeited lands, certified and signed by the auditor and attested by his seal of office.² And under the present revenue law of Illinois, the authority of the collector to advertise the list depends upon his inability to find personal property belonging to the delinquent of value sufficient to satisfy the taxes.³

The act of Congress, relating to the taxing power of the City of Washington, provided "that real property, whether improved or unimproved, &c., on which two or more years' taxes shall have been due and unpaid, or on which any *special* tax, imposed by virtue of the authority of the provisions of this act, shall have remained unpaid for two or more years *after the same shall have become due*, may be sold, &c." In *Ronkendorff v. Taylor*,⁴ the lot in question was sold for the ordinary taxes of 1820 and 1821, which, by the ordinances of the city, became due on the first day of January succeeding the respective assessments, and also for a special paving tax, levied in 1820, which latter tax did not become due until January 1, 1821. The law required three months' notice prior to the sale. The advertisement was first inserted in a newspaper, December 6, 1822. The sale took place March 10, 1823. The court held the advertisement and sale illegal, upon the ground that the law made a clear distinction between general

¹ *Cambridge v. Chandler*, 6 N. H. R. 271; *Homer v. Cilley*, 14 N. H. R. 85.

² *Hannel v. Smith*, 15 Ohio R. 134.

³ R. S. 1845, p. 444, Secs. 46 and 47.

⁴ 4 Peters R. 364.

and special taxes; that property might be sold to pay the general tax *as soon as two years' taxes became due*; but in the case of special taxes it could not be sold *until the expiration* of two years after the tax became due; that the first notice was given nearly one month before the lot was liable to be sold; that the whole period should have elapsed, which was necessary to render the lot liable to be sold for the special tax, before the advertisement was published; that the owner of the lot, by paying the tax at any time before January 1, 1823, would save it from the liability of being sold; and that until this liability had attached, he could not be chargeable with the expense of notice, nor could it be legally given.

5. Next, as to the *form* of the advertisement. The following principles, or rules, for testing the validity of tax titles, appear to be fairly deducible from the reported cases on that subject. 1. When the statute, under which the sale is made, directs a thing to be done, or prescribes the form, time, and manner of doing anything, such thing must be done, and in the form, time and manner prescribed, or the title is invalid; and in this respect the statute must be *strictly*, if not *literally*, complied with. 2. But in determining what is required to be done, the statute must receive a reasonable construction, and when no particular form or manner of doing a thing is pointed out, any mode which effects the object with reasonable certainty, is sufficient; and in judging of these matters, the court is to be governed by such rational rules of construction as direct them in other cases.¹ These two principles are best illustrated by the cases rela-

¹ *Chandler v. Spear*, 22 Vermont R. 388; *Brown v. Hutchinson*, 11 Vermont R. 569.

tive to the form of the advertisement. Where the form is prescribed by the statute, that form must be strictly and literally followed; the court will not admit the substitution of a different one. Thus the statute of Vermont directed the name of the *place* where the legislature held their session, at the time when the tax was granted, to be inserted in the advertisement according to the following form, viz.: "Whereas the legislature of Vermont, at their session, at ———, in the year ———, assessed a tax, &c."; and the statute enacted that "the blanks in the form of the advertisement, herein before directed, *shall* be filled with the *place* of the session of the legislature *where the tax was assessed.*" The collector omitted to comply with this requisition. At the time of the passage of the statute, the seat of government of the State of Vermont was ambulatory, but when the collector made out his advertisement, the legislature had, by law, permanently located the capitol at a fixed place, and the law assessing the particular tax recited in the advertisement, was passed at the place thus fixed. The clerk had also omitted, in making a record of the advertisement, to state the place where one of the newspapers in which it was inserted, was published, as required by the statute. For these defects the advertisement was declared illegal, and the sale void. The court discussed the two questions together, saying: "That the collector should have followed the *form*, and the clerk made the statement of the place where the paper was printed a part of the record, are *positive requirements* of the statute; and a *compliance* with these requisitions must be regarded as a *condition precedent* to the conveyance of a good title, by the vendue deed. Where property is affected, or

the title divested, by the provisions of a special act of the legislature, the requirements of the act must be strictly followed. In the present case the operation of the special statute was to divest the defendant of his property, on his failure to perform a duty created by the statute, and on the performance of certain acts prescribed to the officers required to collect the tax, and record the proceedings. The performance of these acts is *the condition* on which the property was divested, and it is not for the court to inquire whether the provisions of the statute were reasonable, whether a compliance with them might not be dispensed with, without injury to the defendant—but whether they have been made; and if so, they must be *literally pursued*.¹ In another case, the person making the advertisement, omitted to prefix to his signature his official designation of “*Collector*,” as required by the statute form, and the sale was held irregular, upon the ground that the statute form ought to be strictly followed.²

On the other hand, where no form is given, but the statute declares what the contents of the advertisement shall be, each fact required by the statute must appear in the advertisement, or it will be void; thus, the time and place of sale, a description of the lands to be sold, the amount of tax due, the name of the owner, his delinquency, that no goods of his could be found out of which to satisfy the tax, the year for which the tax was due, a recital of the purpose for which the tax was levied, and such other facts as the particular statute under which the notice is given, may have rendered essential. Any omission

¹ *Culver v. Hayden*, 1 Vermont R. 359.

² *Spear v. Ditty*, 9 Vermont R. 282.

in these respects, or variance between the contents of the notice and the facts of the case, will invalidate the proceedings. Thus, where the statute required that the collector should publish an advertisement that he would sell, on a particular day, all lands on which the taxes remained due for the space of nine months from the date of the assessment, and a delinquency for this length of time was not stated in his notice, it was held void. The court saying: "The manifest purpose of this requirement was not only to let the party charged with the tax know that there was such a tax against him, and unpaid, but that his delinquency had continued so long after the date of the assessment, that the law authorized proceedings in the manner prescribed, to obtain the sum required from the land on which the tax was based. Without such notice, which is of substantial utility to the person against whom the tax remains undischarged, he is not informed, in the manner which the legislature have provided, that he is exposed to the costs which will arise from an attempt to obtain the tax from the land itself."¹ In another case the notice recited a tax "for the purpose of making, repairing, and building *bridges*," whereas the tax authorized by the statute was for "making and repairing roads, *and* building bridges." The true object of the tax not appearing in the advertisement, it was held insufficient.²

In describing the land, the collector in his advertisement must give a particular and certain description, so that the owner may know that it is his land, and bidders may ascertain its locality with a view to

¹ *Hobb v. Clements*, 32 Maine R. 67.

² *Langdon v. Poor*, 20 Vermont R. 13.

the regulation of their bids.¹ The statute of Massachusetts required the advertisement, among other things, to state the names of the owners, if known, and when unknown, to give "a *substantially accurate* description of the rights, lots or divisions of the real estate to be sold;" the description given was, "Moses Buffum, house and land, and Loring Emerson, house, barn and 115 acres of land." The court say: "This we consider a very *uncertain* description, and altogether insufficient. The owner's name not appearing in the notice, a *full and clear* description of the property to be sold should be given."² In another case, where the plaintiff claimed under a tax sale, the advertisement contained the following description, viz.:

Name.	No. of Entry.	Original Proprietor.	Original Quantity.	Watercourse	Acres.	Rate.	Tax.
Haines, John	4401	Haines, Jno.	170	Mad River.	73	2	8.92 2

The circuit court instructed the jury that the description was so imperfect that no valid sale for taxes could be made under it. On error, the court say: "The law in requiring an advertisement of the sale, has this double object in view, to apprise the owner that the tax is unpaid, and to invite the attention of purchasers in such manner that the land may be sold for its fair market price. To attain these objects, it is necessary that the description should be such that the owner may know that the tax on *his* land is unpaid, and that purchasers may learn the *precise* tract intended, and be enabled to estimate its actual value. In this case, the whole original entry was taxed to its then owner, Haines, and perhaps was sufficiently

¹ *Brown v. Yeazie*, 25 Maine R. 359; *Tallman v. White*, 2 Comstock R. 66; *Carmichael v. Aikin*, 13 Lou. R. 204; *Farnum v. Buffum*, 4 Cushing R. 260.

² *Farnum v. Buffum*, 4 Cushing R. 260.

described by its number and watercourse ; but ninety-seven acres had been transferred to another name, leaving seventy-three acres still standing to Haines. What 73 acres? In common or separate? If separate, in what part of the lot does it lie? The answers to these questions materially affect the price. Without them no such information is communicated to the public as is calculated to produce a fair competition, and no prudent man will offer its value in his bid. The description, therefore, is not adapted to promote a fair sale, and it must be holden insufficient."¹ In another case the description was, "R. 4, T. 3, Sec. 13, p. N. half, 60 acres." By the court: "The tax title set up by the defendant cannot be sustained. The description in the duplicate and advertisement is too vague and uncertain. 'Sixty acres, part of the N. $\frac{1}{2}$ of section 13.' Which 60 acres? is an inquiry natural to be made. In *Lafferty v. Byers*,² it is held that such a description is too general. The tax sale must be held void."³

In *Douglass v. Dangerfield*,⁴ the advertisement followed the description in the list, (which has already been given,⁵) and it was held void. Where the watercourse, upon which the land was situate, was misdescribed, the advertisement was held illegal.⁶ The Tennessee statute required the collector "to specially and particularly describe the land, and the number of the *grant* or *entry*." In *Gardner v. Brown*,⁷ the land was thus described: "Caleb Cross's heirs, 640 a., No. 1328, lying in 12th district, in the first range, 9th section." The land did not in fact belong to Cross's

¹ *Lafferty's Lessee v. Byers*, 5 Ham. R. 457.

² 5 Ohio R. 458.

³ *Treon v. Emerick*, 6 & 7 Ohio R. 161.

⁴ 10 Ohio R. 152.

⁵ *Ante*, 156-7.

⁶ *Currie v. Fowler*, 5 J. J. Marshall R. 145.

⁷ 1 Humph. R. 354.

heirs, but was granted in 1827 to Jesse Brown, under whom the plaintiff claimed title. The number in the description was that of the entry. The court held the description insufficient. "The land is not particularly and specially described in the advertisement. It is described by the number of the *entry*, and not by the number of the *grant*. The words of the section, indeed, are, that it shall be described by a reference to the "grant or entry," the meaning of which is, that if the land be granted, the number of the grant shall be referred to, and if it be not granted, that the number of the entry shall be referred to; and not that in case of granted land, a reference may be made by the officer, at his election, to the number, either of the grant or entry." In *Jacques v. Copman*,¹ this description was held void, viz.: "A lot of ground in Faugbourg Livandras, Parish of Jefferson, designated by the number 8, square 45."

In *Ronkendorff v. Taylor*,² the description and other particulars in the advertisement were as follows:

To whom assessed.	No. of square.	No. of lot.	Amount.
James N. Taylor.	491	$\frac{1}{2}$ of 4.	\$16,80
Paving tax int., 10 per ct.,			28,46
Henry Toland's heirs.	491	$\frac{1}{2}$ of 4.	16,80

The law required "the number of the lots, (if the square has been divided into lots,) the number of the square or squares, or other sufficient or definite description of the property selected for sale to be stated in the advertisement." The circuit court instructed the jury "that the advertisement did not sufficiently designate *what half* of the said lot was charged with the said taxes, and was to be sold for the same, and

¹ 6 Lou. Ann. R. 542.

² 4 Peters' R. 349.

did not purport to be an advertisement of *an undivided moiety*." This ruling was sustained by the Supreme Court of the United States. McLean, J.: "Congress had two objects in view in requiring this notice to be given; 1. To apprise the owner of the property; and, 2. To give notice to persons desirous of purchasing. It is necessary for the interest of the owner, that he should be informed of a proceeding which, unless averted by the payment of the tax, would divest him of his property. And it was of equal if not greater importance, that the property should be so definitely described that no purchaser could be at a loss to estimate its value. It is not sufficient that such a description should be given in the advertisement as would enable the person desirous of purchasing, to ascertain the situation of the property by inquiry. Nor, if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, yet the sale would be void, unless the same information had been communicated to the public in the notice. Its defects, if any exist in the description of the property to be sold, cannot be cured by any communication made to bidders on the day of sale by the auctioneer. What was the description given in the advertisement of the property in controversy? It was described to be 'half of lot No. 4, in square No. 491,' and the other half was advertised at the same time, under the same description, as belonging to Toland's heirs. What would be understood by such a description? Suppose half a square had been advertised, it having been divided into lots; would it convey that certainty to the public, as to the precise property about to be sold, that would enable any one to form an opinion of its

value? No one could suppose that an undivided half of the square was to be sold under the notice; and which half was offered could not be determined from the advertisement. Would this be a notice under the requisites of the law? The value of a lot, or half lot, depends upon its situation. If one of the half lots front two streets, in a populous part of the city, it is of much higher value than the other half. And this difference in value may be still greater, if the lot be situated near the middle of the square, fronting the street, and it be divided so as to cut off one half of it from the street. It will thus be seen that it is not a matter of small importance, to a person who wishes to purchase, to know which half of a lot is offered for sale; and as any uncertainty in this matter must materially affect the value of the property at the sale, it is of great importance to the owner that the description should be definite. That an undivided moiety of a lot may be sold for taxes, has already been stated. But would any one understand that one-half of lot No. 4 means an undivided moiety? In all cities, half lots are as common as whole ones; and when a half lot is spoken of, we understand it to be a piece of ground half the size of an entire lot, and of as definite boundaries. The illustrations given show how great a difference in value may exist between halves of the same lot. And would not the preferable half be of much higher value than an undivided moiety of the entire lot? In every point of view in which this notice can be considered, under the act of Congress, it was radically defective. The property should have been described as an undivided half of lot No. 4. Under such a description, no one could be at a loss as to its situation and value. The instructions of the circuit court on this point are not erroneous."

Where the statute requires the amount of the tax due upon the land to be stated in the advertisement, an omission of this fact, or a variance between the amount due and the sum named in the advertisement, will be fatal. Thus, in the *Corporation of Washington v. Pratt*,¹ where the act of Congress required the collector to state in his advertisement of the sale "*the amount of taxes due thereon*," and further provided that such lots only upon which "two years' taxes remain due and unpaid," shall be sold, the facts were that several lots were separately assessed to the same person, and the advertisement stated the aggregate amount of taxes due upon all of them; and the sale was held illegal. Johnson, J.: "The question is whether it be necessary that the advertisement should contain a particular statement of the amount of taxes due on each lot separately; or, where several lots belonged to the same person, whether it would be sufficient to state in the advertisement the aggregate amount of taxes due on all the lots so belonging to the same person? This may be a very immaterial question practically, and it may not be very easy to assign a sufficient reason of policy for the one or other alternative. *But what have we to do with such inquiries in cases of positive enactment?* The law must be pursued whatever be the previous steps required. The difficulty here presented is grounded on the use of the words in the eighth section, "*amount of taxes*." This, in its ordinary import, expresses an aggregate of taxes. But it is obvious that we cannot here apply that aggregate idea to a sum made up from the taxes of many lots, since this would also support the sufficiency of a publication exhibiting nothing

¹ 8 Wheaton R. 681.

more than the amount of taxes upon the whole list of lots advertised, whoever be the proprietors. Some more appropriate signification must, therefore, be sought for it, and this is easily found ; for, when it is considered that the taxes of each are made several liens upon each, it follows that this aggregate idea can have reference only to the amount made up from the arrears of the two years, which must be due to authorize a sale. We, therefore, think that the taxes of each lot ought to be severally exhibited. *The operation of such a provision must be the test of its own policy. The duty is easily complied with, and the performance of it may not be destitute of practical utility.*" But in *Ronkendorff v. Taylor*,¹ where two years' taxes were due upon the land, viz., for the years 1820 and 1821, the advertisement in describing the tax for which the land was to be sold, stated that the lot was to be sold "for taxes due thereon *up to* the year 1821." The circuit court instructed the jury that the advertisement was defective, as it "does not purport to advertise the said lot *for two years' taxes* unpaid and in arrear ;" but the supreme court held the instruction erroneous ; that the designation of the tax "was sufficient ; for if the taxes were due, and the property was liable to be sold for them, it can be of no importance to the *purchaser* to have a more technical description of the tax than the notice contained." It may be remarked upon this case, that if a specific and certain designation of the tax due upon the land is necessary at all, it is because the *owner* is interested in knowing from the advertisement itself how much money he is bound to pay in order to prevent the sale of his land ; the purchaser has but little

¹ 4 Peters R. 349.

interest in the question. If this be true, it will be difficult to maintain upon principle the designation of the tax in question. The taxes were in fact due upon the land for the years 1820 and 1821. The notice says the land will be sold for the taxes due thereon "*up to the year 1821.*" The words "*up to*" do not, upon any fair rule of construction, *include* the taxes for the year 1821. On the contrary, back taxes prior to the year 1821, were alone intended as far as the language used possesses any meaning. Besides, it must be remembered that the act of Congress only permitted a sale of land "*on which two or more years' taxes shall have remained due and unpaid,*" and it would seem that the advertisement ought, upon its face, to notify owners and bidders that a power of sale had actually attached at the time of its publication. But, on the other hand, in a proprietary tax, where an equal sum is assessed upon each proprietor, it is sufficient to state in the notice the gross sum due upon the whole tract held in common.¹

It is also essential that the advertisement should name the time certainly when the sale will take place.²

It should also state the place where the sale is to be made. But where the advertisement, in describing the place of sale, said, "at the court house in Warren," but omitted the words "Trumbull County," it was held sufficient; the court taking judicial notice of the fact that at the date of the advertisement there was no town of Warren in Ohio, except that in Trumbull County.³

Where the statute is silent as to the form and con-

¹ *Wentworth v. Allen*, 1 Tyler R. 226.

² *Wilkins v. Huse*, 10 Ohio R. 139.

³ *Sheldon v. Coates*, 10 Ohio R. 278.

tents of the advertisement, but directs generally that the collector shall give notice, the statute is to receive such a construction as will enable the delinquent to ascertain whether his land is advertised, the amount of the tax charged upon it, and the time and place when and where the sale will take place. Thus, under the acts of Congress of January 9, 1815, and March 5, 1816, it was declared, that when the owner was a non-resident of the collection district where the land lay, and the tax remained unpaid for the space of ninety days, the collector should "transmit lists of the same to one of the collectors within the State, to be designated by him for the purpose, &c., and the collector thus designated, &c., shall cause notifications of the taxes due, as aforesaid and contained in the lists thus transmitted to him, to be published for sixty days, &c.," and section 4 of the act of 1815 provided that "the secretary of the treasury shall establish regulations suitable and necessary for carrying this act into effect." The notice, in fact, published, was in this form, viz: "Notice is hereby given that the subscriber has received lists of the direct tax of 1816, remaining due upon property in the following counties in the State of New Hampshire, not owned, &c., and that he is authorized to receive said taxes, with an addition of ten per cent. thereon, &c., E. Cutts, Collector designated, &c." No description of the land, or particulars of the tax, or name of the owner, were stated in the notice, but it appeared that the notification was in the form prescribed by the secretary of the treasury. The advertisement was held illegal, the court saying: "It (sec. 4) cannot be construed to authorize him (the secretary of the treasury) to dispense with a clear requisition of the statute. The

object must prevail. *It is true that the statute does not require in express terms, that any description of the land taxed, or that the name of the owner should be inserted in the notification.* But what is a notification of a tax? Can anybody suppose that a mere publication of the figures that express the sum assessed would be a notification of the tax, within the meaning of the statute? We think not. It seems to us to be implied in the very terms 'notification of the taxes,' that notice was to be given to *each owner* that the tax on his land remained unpaid."¹

Where the law requires the collector to state in the advertisement the names of the owners, if known, an omission to do so will invalidate the sale.² If the name of the owner is unknown, then a more accurate and certain description of the lands will be exacted from the collector than in ordinary cases. This was held under a statute which required the name of the owner to be inserted, if known, otherwise a substantially accurate description of the land.³ The evident object of the statute is to give to the owner every facility, in the ascertainment of his delinquency, which his own name and a description of his property can afford to him, upon an inspection of the notice; and the courts ought to be as strict in requiring the statute to be fully complied with in this respect, as in reference to any other prerequisite. It has been held, however, in one case, that a misnomer of the real owner will not invalidate the sale.⁴ This case does not seem to be consistent with principle, or in conformity with the adjudged cases.

¹ *Eastman v. Little*, 5 N. H. R. 290; *Michie v. Mullen*, 5 Haywood R. 90.

² *Shimin v. Inman*, 26 Maine R. 228; *Corporation of Washington v. Platt*, 8 Whea. R. 681.

³ *Farnum v. Buffum*, 4 Cushing R. 260-6.

⁴ *Alvord v. Collin*, 30 Pick. R. 418.

The notice must be published the full length of time required by law, or it will be void. To use the language of Judge Wayne: "Property is liable to be sold on account of an undischarged obligation of the owner of it, to the public or to his creditors. But it can only be done, in either case, where there has been a substantial compliance with the prerequisites of the sale, as these are fixed by law. Any assumption by the officers appointed to make the sale, or disregard of them, the law discountenances. He may not do any thing of himself, and must do all as he is directed by the law under which he acts. He may not, by any misconstruction of it, anticipate the time for sale within which the owner of the property may prevent a sale of it by paying the demand against him, and the expenses which may have been incurred from his not having done so before. This the law always presumes that the owner may do, until a sale has been made. He may arrest the uplifted hammer of the auctioneer when the cry for sale is made, if it be done before a *bona fide* bid has been made."¹ Thus, where the notice was required to be published "once a week for at least twelve successive weeks," and the first insertion was on August 26, 1848, and the time fixed for the sale was November 15, in the same year, the sale was held illegal, only eighty-one days intervening.² So, where the law required four weeks' notice, and the proof was a publication eleven days prior to the sale, it was held illegal.³ So, where the law required "ninety days' notice," and the advertisement was dated November 1, and on that day

¹ *Early v. Doe*, 16 Howard U. S. R. 610.

² *S. C.*, 16 Howard R. 610.

³ *Nalle v. Fenwick*, 4 Rand. R. 594-5.

handed to the publisher of the newspaper, and was inserted therein weekly, from November 6 until the 29th day of January following, and the sale took place on the third day of February ensuing, being the day fixed in the notice, the sale was held illegal. It will be perceived that between the date of the advertisement and the day of sale, there were more than ninety days ; but between the date of the first insertion and the day of sale there were but eighty-nine, excluding, as the court did, the first, and including the last day.¹ Another statute of Alabama required three months' notice of the time and place of selling resident lands, by publication in a newspaper. In *Scales v. Avis*,² it appeared that the collector advertised, on January 4, that a sale of the resident lands would take place on February 1 ensuing ; discovering the error, he changed the time of sale to April 1, altered his advertisement after it had been published one month, and gave notice to the delinquent, who consented to the irregularity ; yet the sale was held void. The Provincial Act of 26 Geo. II., required forty days' notice of the sale of the interest of delinquent proprietors. The proprietary tax, for which the land was sold, was voted only thirteen days before the date of the tax deed. The sale was made in 1780, and the question as to the regularity of the sale arose in 1833. The court, with every desire to uphold a transaction so ancient, held the sale void, as it was utterly impossible that the notice required could have been given under these circumstances.³ The charter of New Orleans re-

¹ *Pope et al. v. Headen*, 5 Ala. R. 433.

² 12 Ala. R. 617.

³ *Farrar v. Eastman*, 1 Fairfield R. 191 ; S. C., 5 Greenl. R. 345, and 9 Ibid. 191

quired *three months' notice* of the sale by *several* insertions in a newspaper, but was silent as to whether the notice should be published three months *immediately preceding the sale*. The advertisements were inserted in the months of December, February and March, omitting altogether a notice in the month of January. The sale took place April 7, in pursuance of the notice; but it was declared void, the court holding that the statute evidently meant that the notice should be inserted during the three months immediately preceding the day of sale, otherwise the notice might be given at any time the corporation pleased, and at such great intervals of time as to render nugatory nearly all the objects to be attained by advertising.¹ But in *Busey v. Leavitt*,² where the statute required "three successive publications in a newspaper three months prior to the sale," the court held that the *last* insertion must be three months prior to the sale. The statute of Ohio required the delinquent list and notice of sale to be published at least four weeks, "between the first days of October and December," and the law further provided that the county auditor "shall, before the day of sale (which was fixed on the *last* Monday in December,) mentioned in such notice, record in a book to be provided for that purpose, such delinquent list and notice, copying the same from the paper in which they shall be published, and shall certify at the foot of said record the name of said paper, and the *length of time* such list and notice were published therein." In *Kellogg v. McLaughlin*,³ the plaintiff, in support of his tax deed, offered in evidence the record of the list and notice, with the

¹ *Delagny v. Smith*, 3 Lon. R. 418.

² 3 Fairfield R. 378.

³ 8 Ohio R. 114.

certificate of the auditor attached thereto, which latter stated that the list and notice had been published "four weeks between the *first Mondays* of October and December." He also offered parol evidence to show that the advertisement was published between the first days of those months. But the court held, 1. That the record was insufficient upon its face to prove a legal advertisement; and, 2. That parol evidence was inadmissible to aid it. This latter ruling is in conformity with the principle established by all of the authorities, that an advertisement in this class of cases, must be valid upon its face, and that if otherwise, extrinsic evidence cannot be admitted to explain or help it.¹ "The object of giving notice," remarks Judge Scates, in the last named case, "I think would be completely defeated, if such evidence could be admitted to correct the mistake, (in the date of the advertisement,) unless the party would bring that explanation home to each person in interest, and also show that the public were apprised of the mistake, and did attend the sale, so as to ensure fair competition at the biddings. Sales might be conducted under such defective notice, and the party be able to show it to be a mistake, and what the true intention was, still the public might not be apprised of it; the purchaser might, as is said by the court in Ohio,² obtain acres for cents without competition, the tax payer have his land sacrificed for a trifle, and yet the purchaser sustain his purchase by showing what the collector intended, or that the printer had made a mistake. There is too much uncertainty; the mischief would be irreparable.

¹ *Alford v. Collin*, 20 Pick. R. 418; *Fitch v. Pinckard*, 4 Scam. R. 69.

² 2 Ohio R. 233.

The object is to secure competition, for the benefit of all concerned; and if the notice is so defective, as not to give the proper information, the sale will be void. This secret information or intent of the publication cannot aid it."

The statute of Indiana provided that the "county auditor shall on the first day of October annually, make out and record a list of delinquents, and cause a copy of such list to be *immediately* published four weeks successively in some newspaper having a general circulation in his county, if any there be, otherwise by three notices to be posted up in public places in each township in his county;" and the law further required the sale to take place on the first Monday in January. In *Doe v. Flagler*,¹ the facts were that the publication was not made until November 20; a mistake was then discovered, and an amended notice inserted November 27, and this last list was published in the Evansville Journal, on November 27, and on December 4, 11 and 17. It was contended by the counsel for the tax purchaser that inasmuch as four weeks' notice of the sale was given, there was a substantial compliance with the law, but the court held the proceedings void; that the term "immediately," meant a publication as soon after October 1, as the same could be reasonably effected; that in this case there was a delay of fifty days on the part of the auditor, and no reason shown for it.

The statute of Illinois gave to delinquents until October 1, to pay their taxes, and directed the State auditor to advertise the delinquent list three weeks successively, the last publication to be at least sixty days before the day of sale. Where the sale was

¹ 1 Carter R. 542.

made on December 9, 1823, it was held void.¹ In all cases where it appears upon the face of the tax deed, when taken in connection with the law, that the full notice required has not been given prior to the sale, the deed is held void for all purposes.²

In *Ronkendorff v. Taylor*,³ where the law required the advertisement to be inserted "once a week for three months," the facts were, that the first notice was given December 6, 1822, and the last, March 10, 1823. The sale took place on the latter day. These periods embraced the time the notice was required to be published, but it appeared on inspection of the newspaper in which the notices were published, that between three of the publications there was an interval of eight, ten and eleven days, respectively. It was contended by the counsel for the former owner that "once a week" meant once in every seven days. On the other hand it was insisted that when a time is fixed for the performance of an act, the whole time is allowed within which to do it, even to the last minute ; that the requisition to publish once a week gave the whole of the week succeeding the first insertion for the second publication ; that the law did not designate on what particular day in the hebdomadal division of a week the advertisement should appear ; that the name of the day of the week on which the advertisement should be inserted was of no moment, as the names of the days of the week were purely arbitrary ; that it was the period of seven days, which the law regarded as the space of a week ; and in this case, as there was no period of

¹ *Moore v. Brown*, 4 McLean R. 211 ; S. C., 11 Howard U. S. R. 414.

² *Moore v. Brown*, 11 Howard U. S. R. 414 ; *Farrar v. Eastman*, 1 Fairfield R. 191.

³ 4 Peters R. 349.

fourteen days in which the notice of the sale was omitted, the advertisement was regular. Judge McLean, in delivering an opinion sustaining the legality of the advertisement, says: "The words of the law are, 'once a week.' Does this limit the publication to a particular day of the week? If the notice be published on Monday, is it fatal to omit the publication until the Tuesday week succeeding? The object of the notice is as well answered by such a publication as if it had been made on the following Monday. A week is a definite period of time, commencing on Sunday and ending on Saturday. By this construction, the notice in the case must be held sufficient. It was published Monday, January the 6th, and omitted until Saturday, January the 18th, leaving an interval of eleven days; still the publication on Saturday was within the week succeeding the notice of the 6th. It would be a most rigid construction of the act of Congress, justified neither by its spirit nor its language, to say that this notice must be published on any particular day of a week. If published once a week, for three months, the law is complied with, and its object effectuated."

Where the law requires the advertisement to be published in several languages—for instance, in English and French, or English and German—the neglect of the collector to comply with this requisition will render the advertisement illegal, and the sale founded thereon void.¹

Sometimes the law requires the notice to be published in a newspaper having the greatest circulation in the county where the sale is to take place; when such is the case, a compliance with the requirement

¹ *Young v. Martin*, 2 Yeates R. 312; *Delogny v. Smith*, 3 Lou. R. 418.

is essential to the validity of the advertisement. Thus, in the *Lessee of Hughey v. Horrell*,¹ the statute of Ohio declared that the county auditor, on receiving the delinquent list, "shall forthwith cause the same to be advertised six weeks successively in some newspaper printed at the seat of government in this State; and also, in a newspaper printed in his proper county, if any such there be, and if not, in some newspaper in *most general circulation* in said county." The facts were that the notice was published in a newspaper at Columbus, the seat of government, and in no other. It appeared in evidence that the newspapers of Chillicothe and Springfield had a *partial* circulation in the county where the land lay, but that the Columbus papers had the most general circulation there; and it further appeared that there was no newspaper printed in the county of the sale. The court held the notice illegal. "It is contended," say the court, "by the defendant, that as there was no paper printed in the county of Madison, and as the Columbus paper was in general circulation in that county, it was not necessary to publish the notice in any other. The law does not admit of such construction. The publication must be made in two papers, one printed at Columbus, and the other in the county where the auditor resides, if there be such a paper, and if not, then in some paper (other than the one printed at the seat of government) in most general circulation in his county. The design of this provision was to extend the notice as generally as possible, for the information of owners, and for the purpose of increasing competition at the sale. This requisition is substantial and useful, and cannot be

¹ 2 Hammond R. 231; S. C., 1-4 Ohio Cond. R. 335.

dispensed with." In *Doe v. Sweetser*,¹ the law required the county auditor to publish the notice four weeks prior to the first Monday in January, the day of the sale, in some newspaper having general circulation in his county, if any such there be, "else by posting notices, at some public place, in each county commissioner's district, &c." The facts were that there was no paper printed in the county of the auditor, where the delinquent land lay; and the evidence of the required notice was a certificate of the county auditor, which was competent to prove the facts contained in it under the laws of Indiana, in these words: "October 23, 1844. I, John Gilbert, county auditor, &c., do hereby certify, that I wrote three copies of the foregoing delinquent list and notice; that I put one of them on the court-house door, and handed the other two to the sheriff, requesting him to put up one in each of the remaining commissioners' districts, &c. I further certify, that said advertisements were put up publicly more than four weeks prior to the first Monday in January, 1845, &c." The sale was held illegal. By the court: "It does not follow because no paper was published in the county where the land lay, that none had a general circulation there."

A publication in *extra sheets*, which are circulated with the paper designated by law, is a legal notice; but where it appears that the extra sheets were not, in fact, sent to *all* of the subscribers of the paper, the advertisement will be regarded as void.² Such was the practice in Illinois from 1823 to 1830, but as the notices were all illegal in other respects, this question

¹ 2 Carter R. 649.

² *Davis v. Simms*, 4 Bibb R. 465.

was never judicially determined. But there seems to be no plausible objection to a publication in extras, if the circulation of them is as extensive as the newspaper itself, in which the notice is required to be published. The extra would have, under such circumstances, the same publicity as the regular sheet. No one could be prejudiced by it; and, for the purposes of preservation and reference, the extra sheet, containing nothing but the delinquent list, would be more convenient to all concerned. The strictness required in regard to the notice of the sale, is very strongly illustrated by the case of *Porter v. Whitney*,¹ which was a writ of entry, where the tenant claimed under a tax sale, made twelve years prior to the trial. The facts were, that the sale was made by the collector of Brownfield, for the non-payment of taxes assessed by that town, that the land demanded was formerly a part of the town of Porter, and was annexed by law to Brownfield within three years next before the time of advertising the sale, but the name of Porter was not expressed in the advertisement. The statute declared that "when the name of the *place* in which such lands lie, may have been altered, by any act of this commonwealth, *within three years* next preceding such advertisement, he (the collector) shall express, not only the present name, *but the name by which the same was last known.*" The sale was held illegal. Mellen, C. J.: "The object which the legislature evidently had in view, in this enactment, was to give *effectual* notice to all concerned, and prevent any misconception by such an alteration in the name of the place, as would essentially alter its description. We ought, therefore, to give such a con-

¹ 1 Greenl. R. 306.

struction to the law as to attain, as far as may be, the object in view. The advertisement described the land as situate in Brownfield; it should have been more particular, and stated that it was situate in *that part* of Brownfield, which was formerly a part of Porter, and which had been annexed to Brownfield. This would have put the proprietor on his guard, and prevented all mistake and damage." Where the law requires the advertisement to be inserted in two or more papers, it is essential that the notice should be inserted in all of them, or the sale will be void; the reason is, that the spirit of the law requires the greatest possible amount of notoriety to be given of the time and place of sale, with a view of giving full notice to the delinquent, and for the further purpose of insuring a greater competition at the biddings.¹ The statute of New Hampshire required notices of the sale to be posted in public places, for at least eight weeks prior to the day of sale, and an affidavit of the fact that the law had been complied with in this respect, but was silent as to who should make the affidavit, and as to the contents of it. In *Nelson v. Pierce*,² the evidence of the posting of notices of sale was a sworn certificate of W. Kenney, who was the occupant of the public house where the notice was posted. The certificate was in these words: "Bethlehem, January 7, 1829: I hereby certify that the advertisement of non-resident lands for the year 1828, hereto annexed, has remained posted up in my bar room, in said Bethlehem, more than eight weeks prior to this date. W. Kenny." The notice was held not to be sufficiently proved. 1. Because it was

¹ *Hughey v. Horrell*, 2 Ham. R. 231; *Allen v. Smith*, 1 Leigh R. 231.

² 6 N. H. R. 194.

doubtful whether the affidavit could be made by any other person than the collector, whose duty it was to post the notices; and, 2. Because the certificate did not state when the notice was first posted. On this latter point the court say: "It is not enough that it states the advertisement to have been posted up more than eight weeks. *We cannot know how he computes time in such a case.* The affidavit should state the day when the advertisement was put up, and then *we* can see whether it was put up in due season." The statute of Connecticut authorized the notice to be given by posting it on the *sign-post* of the town—a place where it is lawful, by the custom of that State, to post all legal notices—a place where all persons interested are in the habit of resorting for information in cases where a legal advertisement is required to be given.¹ In other States, the law requires a notice to be posted in a "*Public Place.*" Where such is the requisition, the courts are extremely strict in requiring proof that the place of posting was in fact a public place of resort, calculated to give all of the notoriety to the sale, which the law evidently contemplated.² In *Cambridge v. Chandler*, the town where the land lay was unorganized and uninhabited, and the advertisement was posted on a board, fixed in the sand, by the side of the Androscoggin river—this was held not to be a public place within the meaning of the law. And in *Tidd v. Smith*, the notice was posted on the 11th day of January, 1820. The sale was fixed for March 9th, 1820. The law required three successive weeks' notice. The notice remained up for the requi-

¹ *Ives v. Lynn*, 7 Conn. R. 505.

² *Doe v. Sweetser*, 2 Carter R. 649; *Cambridge v. Chandler*, 6 N. H. R. 271; *Tidd v. Smith*, 3 Ibid. 178.

site time. When first posted, the place where it was put up was a public place, viz., a tavern—but on the 18th day of that month it ceased to be a tavern, but the innkeeper remained in the building, and carried on the business of a shoemaker, in the identical room where the notice was posted; and the proof was that many persons frequented the shop for several weeks after the innkeeper turned shoemaker. The court held that the place ceased to be a public one after the 18th day of January, and that consequently the sale was illegal. In some of the States a *personal notice* to the owner is required, before a sale of his land is authorized; where this requirement has not been complied with, the sale has been held void.¹

There is a statute in North Carolina² which requires that “the sheriff shall, at the term of the county court next preceding the day of the sale for taxes, return a list of the land upon which the taxes are unpaid, and which he purposes to sell for taxes, therein mentioning the owner of each parcel, and if the owner be unknown, the name of the last reputed owner, and the amount of the tax due thereon; and that the list shall be read aloud in open court, a copy recorded by the clerk upon the minutes of the court, and that a copy shall be set up by the clerk during the term in the court room.” In *Doe ex. dem. Kelley v. Craig*,³ these requirements were not complied with, and the sale held void. Ruffin, C. J.: “It seems to us that this provision is *not merely directory*, but that it is to be observed by the sheriff as a part of his duty, and as far as respects the making of the return and having it recorded, it is essential

¹ *Moulton v. Blaisdall*, 24 Maine (11 Shepley) R. 283; *Brown v. Veazie*, 25 Maine (12 Shepley) R. 359; *Williams v. Peyton*, 4 Wheaton R. 77; 4 B. Monroe R. 116.

² 1819.

³ 5 Iredell R. 129.

to his authority to sell the land. It was known that notice by advertisement was a very uncertain method of informing the owner, and especially of unlisted property, that his land was to be sold; and moreover, that on account of the difficulty of a purchaser proving the advertisement at remote periods, and of the necessity, nevertheless, of supporting fair purchases, the courts had held¹ that sales made without advertisement, and without the knowledge of the owner, should stand, notwithstanding the prejudice that might arise to the owner. The intention of the act of 1819 was to provide a more certain or probable notice to the owner, of the intended sale of his land, and of the reason therefor, by requiring it to be given in open court, at the term next preceding the sale, and to be recorded *so that the rumor thereof*, at least, might reach him, and that upon investigation he might find at a known place, a permanent and certain evidence of the truth of the matter. So, too, the bidders cannot be deceived by any false report, as they can respecting advertising in the country, or in a newspaper, as the evidence is of record, and at home, and if they choose to look, they must know whether the sheriff has done his duty by the owner or not. If he has not, his sale ought not to pass the title more than if it was *by private contract, or was not made at the court-house, or on a wrong day of the week; in all which cases, the wrongful conduct of the officer must be known to the bidder, and therefore his purchase ought not to stand.* Indeed, the proceeding, directed by the act of 1819, is *very much in the nature of a judgment*, and a purchaser can as readily search for and find the one of record as the other, and therefore there is as little

¹ *Ante*, pp. 254-6

reason to dispense with the one as the other. The legislature meant to give the citizen an effectual protection against *surprise* in the sale of his land for taxes, but at the same time to do so without exposing bidders to the danger of paying their money, and not getting the benefit of their purchases, provided they would take the reasonable and not inconvenient precaution, of availing themselves of the means provided for informing themselves, whether the sheriff had a right to sell or not. No person can be hurt by this construction, but one who willfully keeps his eyes shut against the light the law supplies to him. We think the sale to the lessor of the plaintiff was therefore radically defective, and passed no title." This was a peculiar statute, and its provisions, in one respect, somewhat analogous to the proclamations of a fine, under the old English statute; and the fact that the court required a strict compliance with its provisions, is one of the very strongest illustrations of the degree of strictness, exacted in the giving of every notice of sale, which the legislature have seen proper to prescribe in this class of cases. Proof of the advertisement depends upon the same general principles which relate to the other prerequisites of the law. The *onus probandi* rests upon the purchaser at the tax sale, or those claiming under him.¹ The deed is not *prima facie* evidence that the sale was duly advertised.² Where the law requires the advertisement to be recorded, the record alone can be resorted to for the purpose of determining its existence and sufficiency. Parol evidence is inadmissible

¹ *Ante*, Chapter 3.

² *Garrett v. Wiggins*, 1 Scam. R. 335; *Kinney v. Beverly*, 2 Hen. & Munf. R. 318.

to supply any defect in the record, or to explain any uncertainties that may exist in it. And the courts are strict in requiring a rigid adherence to the requisitions of the law, as to the contents of the record; it must conform to the statute in all respects. In those States where the law requires the advertisement to be recorded, this strictness is maintained, upon the ground that the evident object of the law is to perpetuate the evidence of the notice by matter of record, for the common benefit of the purchaser and former owner; that the introduction of parol evidence in aid of the record thus required to be made, would defeat the policy of the law.¹ The statute of Illinois requires the certificate of publication to be recorded,² and the question has several times been raised upon the circuit, and in the Supreme Court, as to the validity of the proceedings where the clerk has omitted his duty in this respect; but the cases have been determined upon other points, so that it is still an open question in that State. The manifest object of the statute is, to show upon the face of the record the jurisdiction of the court, and to perpetuate the evidence that the sale was duly advertised. It concerns the former owner and the purchaser at the tax sale, and it would seem upon principle, and authority, that such a requirement can in no sense be regarded as merely directory to the clerk; but that it is one of those peremptory provisions which cannot be dispensed with without invalidating the entire proceedings—defeating the jurisdic-

¹ *Calver v. Hayden*, 1 Vermont R. 359; *Coit v. Wells*, 2 Ibid. 318; *Clark v. Tucker*, 6 Ibid. 181; *Spear v. Ditty*, 9 Ibid. 282; *Isaacs v. Shattuck*, 12 Ibid. 668; *Carpenter v. Sawyer*, 17 Ibid. 121; *Judevine v. Jackson*, 18 Ibid. 470; *Langdon v. Poor*, 20 Ibid. 13; *Taylor v. French*, 19 Ibid. 49; *Kellogg v. McLaughlin*, 8 Ohio R. 114.

² *Ante*, p. 228, Sec. 27.

tion of the court, and the power of the collector to sell the land. Ordinarily, no presumption will be indulged in, for the purpose of supplying the omission of proof in relation to the publication of the advertisement.¹ Though in support of an ancient possession, it may be permitted. This, however, will be examined more at large hereafter. But the law is not only well settled, but apparent to every one, that no presumption can be indulged in to supply a defect which appears upon the face of the advertisement.² It may be stated as a general rule, that where an advertisement is illegal in any respect, the consent of the owner, having notice of the irregularity, cannot confer authority upon the officer to proceed with the sale. He derives his power from the law—and not from the owner of the land—and he must strictly conform to all its requisitions.³ The date of the advertisement is *prima facie* evidence as to the time when it was made and published.⁴ But where a notice of sale, and the paper itself which contained it, were dated in 1836 instead of 1837, and parol evidence was offered to prove the mistake, the evidence was held incompetent.⁵ The reasoning in support of this decision of the court, has already been given.⁶

¹ *Allen v. Smith*, 1 Leigh R. 231.

² *Farrar v. Eastman*, 1 Fairfield R. 191 ; *Porter v. Whitney*, 1 Greenl. R. 306.

³ *Scales v. Avis*, 12 Ala. R. 617.

⁴ *Langdon v. Poor*, 20 Vermont R. 13.

⁵ 4 Scam. R. 81.

⁶ *Ante*. pp. 280-1.

CHAPTER XIII.

OF THE AUTHORITY OF THE OFFICER TO SELL.

THE power of sale does not attach until every prerequisite of the law has been complied with.¹ The regularity of the anterior proceedings is the basis upon which it rests. Those proceedings must be completed and perfected, before the authority of the officer to sell the land of the delinquent, can be regarded as consummated. The land must have been duly listed, valued and taxed—the assessment roll placed in the hands of the proper officer, with authority to collect the tax—the tax demanded—all collateral remedies for the collection of the tax exhausted—the delinquent list returned—a judgment rendered where judicial proceedings intervene—the necessary precept, warrant or other authority, delivered to the officer entrusted with the power of sale—and the sale advertised in due form of law—before a sale can be made. In a word, every act which can be regarded as a *condition precedent* to a valid sale, must precede the execution of the power in question; otherwise, there is no authority to sell, and the whole proceeding will be treated as a nullity.²

¹ *Minor v. Natchez*, 4 S. & M. R. 627-8.

² *Lessee of Holt's heirs v. Hemphill's heirs*, 3 Hammond R. 232; S. C., 1-4 Ohio Cond. R. 551; *Bishop Loan*, 4 B. Mon. R. 116; *Garrett v. White*, 3 Iredell's Eq. R. 131.

Whether a *special* authority, directly commanding a sale of the lands embraced in the delinquent list, is essential, where all of the previous proceedings are regular, depends upon the peculiar legislation of each State. In some instances the officer derives his power of sale from the law itself, which is his warrant, commanding him, without the intervention of any other agency, to sell, and fixing the time, place and manner of sale.¹ In others, especially where a judgment is required, a precept or other process is delivered to the officer, which constitutes his authority to sell.² In others, a simple copy of the delinquent list, duly authenticated, is delivered to the officer, and sometimes there is superadded a command or direction to proceed and sell.

In Illinois, under the acts of 1827 and 1829, lands not listed in the county of their locality, were required to be returned by the county clerk to the auditor of State, on or before July 15, annually, and in case the taxes remained unpaid for a limited time, the auditor was authorized to advertise and sell the land. Until this list is returned by the clerk to the auditor, his power of sale does not attach.³ Under the law of 1833, which transferred the sale from the auditor to the county clerk, the authority of the clerk to sell depended upon the delivery to him of a list of delinquents by the auditor.⁴

The law of North Carolina required the owner to list his land with the justice of the peace in his precinct; if he neglected to do so, the justice was au-

¹ *McCoy v. Tuck*, 1 Penn. R. 499.

² *Hinman v. Pope*, 1 Gilm. R. 131; *Lessee of Wilkins v. Huse et al.*, 9 Ohio R. 154.

³ R. L. 1833, p. 524, Sec. 3; *Messenger v. Germain*, 1 Gilm. R. 631.

⁴ R. L. 1833, p. 528, Sec. 1.

thorized to appoint a freeholder to value the land on oath, and make a return thereof to the justice ; which return the justice was directed to add to his list, and transmit the whole to the clerk of the county court. In case of failure by the owner and justice, the sheriff was required to list the land, and summon a freeholder to value it, in which case the freeholder was required to send a transcript of the list and valuation to the clerk of the county court, before the next succeeding term of that court, and the clerk was directed to incorporate that with the list returned by the justice ; the tax lists thus returned were directed to be recorded by the clerk. In *Pentland v. Stewart*,¹ the court say : “ These records, it seems to us, *are in the nature of judgments* against each individual on the lists, for the sums respectively set against their names.” The statute further provided that within thirty days after the term of the court to which the lists were returned, the clerk should make out and deliver to the sheriff a copy of the lists, upon the receipt of which the latter was directed to proceed and collect the tax by demand, seizure of goods, or sale of the land. In commenting upon this requirement, the court, in the case last cited, remark : “ The certified copies of the tax lists, delivered by the clerk to the sheriff, are, in law, his warrant of distress or *execution* against the property of each individual, for the satisfaction of the money due on them.” The court, therefore, held, that as “ in ordinary cases, where a party claims under a sheriff, he is compelled to produce a judgment and execution against the debtor, as well as the sheriff’s deed,” so in deducing title under a tax sale, the purchaser must produce the record of

¹ 4 Dev. & Bat. R. 386.

the lists in lieu of a judgment, and the copy of it delivered to the sheriff as a substitute for an execution, otherwise the sheriff has no power to sell and convey the land.

The statute of Ohio, of March 14, 1831, required the auditor of State to transmit to the county auditor a list of all lands which had been forfeited to the State for the non-payment of taxes assessed thereon, said list to be certified and signed by the auditor of State, and to have thereto affixed his seal of office, "which list shall set forth the name or names of the person or persons to whom such lands stand charged with taxes, the amount of taxes due thereon for each year, and for what years;" and the law further provided, that unless the taxes due upon the lands embraced in the list were paid by October 15, the county auditor should advertise and sell the same. In *Hammel v. Smith*,¹ the evidence offered, to show that such list was transmitted to the county auditor, was a letter dated June 5, 1843, signed "Jno. Brough, auditor of State, by J. B. Thomas," stating that a list was inclosed, and authorizing the county auditor to proceed and sell. The court held the authority insufficient and sale void upon three grounds: 1. The list was not certified to be correct. 2. It was not attested by the signature of the auditor or his chief clerk. 3. It was not verified by the official seal of the auditor. A list thus authenticated would no more authorize the county auditor to sell the lands specified in it, than a letter written by the clerk of a court, and directed to the sheriff, informing him that a judgment had been rendered by the court in a certain cause, would authorize the sheriff to levy

¹ 15 Ohio R. 134.

upon and sell the land of a judgment debtor. The court, after reciting the statute, say: "It is apparent from this law that the authority of a county auditor to sell forfeited land is derived from this list thus transmitted to him by the auditor of State. As well might a sheriff, without an execution, sell lands to satisfy a judgment, as a county auditor undertake to sell without this list."

The statute of New Hampshire required the assessors to deliver the tax list to the collector, on or before the thirtieth day of May, annually; the collector was directed to deliver a copy of the list to the deputy secretary of State, on or before the eighth day of the next ensuing session of the general court; this copy was to be kept by the deputy until September 1, and on application of the collector, the deputy was to return to the former the copy. The power of the deputy to collect taxes continued until the return, that of the collector until the sale. Where the collector sold the land before the copy of the list was returned to him by the deputy secretary, the sale was held void. Prior to this return, the collector had no means of ascertaining whether the owners were delinquent; the taxes may have been paid to the deputy secretary, and this may have been the very reason why no return was made.¹

In Louisiana the sheriff is authorized to demand the tax, and if not paid, he may proceed and sell the land of the delinquent; if the person against whom the tax is assessed is a non-resident, or absent from the collection district, so that a demand cannot be made, the collector is required to make a return of

¹ *Homer v. Cilley*, 14 N. H. R. 85; *Iron Manufacturing Co. v. Barron*, 3 *Ibid.* 36.

all such persons to the State treasurer, and this return constitutes the authority of the treasurer to sell the lands embraced in the return. A sale of the land of a non-resident or absentee, by the sheriff instead of the treasurer, is void.¹ Where the statute requires the tax list to be delivered to the collector, on or before a particular day, and this requirement is not conformed to, the collector has no authority to sell.²

The statute of Maine provided, that when no person shall appear to discharge the taxes duly assessed on lands belonging to non-residents, "within nine months from the *date* of the assessment, the collector shall make a true copy of so much of the assessment as relates to the taxes due upon such real estate, and certify the same to the treasurer of the town or plantation." The power of sale was vested in such treasurer. In *Flint v. Sawyer*,³ it appeared that the assessment was dated August 14, 1844, and the return of the non-resident list was made by the collector to the treasurer May 13, 1845. The sale was held void. By the court: "When a statute requires an act to be performed in a certain time from the date of some transaction, the day of such date is excluded in the computation of the time. The collector should have waited during all of the business hours of the 14th day of May, 1845, for the owner of the land to pay the tax upon it, before he made his certificate to the town treasurer. The owner of the land was entitled to the full term of nine months, in which he could make his payment without costs. Besides, the taxes may have been paid on the

¹ *Thompson v. Rogers*, 4 Lou. R. 9.

² *Proprietors of Cardigan v. Page*, 6 N. H. R. 182.

³ 30 Maine R. 226.

14th, within the nine months allowed therefor, and the certificate of the collector still be true."

The statute of Maine required the sale to be made within two years from the date of the warrant to collect. In *Usher v. Tuft*,¹ the warrant was dated July 25, 1838, the advertisement was published June 6, 1840, and the sale was made October 10, 1840. In support of this sale, it was insisted that a tax sale was made up of the seizure of the property, the publication of the notices, and the striking off the land to the highest bidder; and that if the seizure be made within two years from the date of the warrant, the analogies of the law authorized the sale to be *completed* afterwards; that the sale had *relation* to the seizure; that in case of a sale under execution, if the levy was made in the lifetime of the execution, the sale might take place afterwards. The court, however, held the sale void.

Where the statute is silent as to the verification of the list, or other document, which constitutes the authority of the officer to sell, by the oath of the officer who is required to make it, no such oath is necessary. The oath of office and the liability of the officer to parties injured by a false list, constitutes the only security of the citizen in such cases.² The statute of Ohio required the county treasurer, who was *ex officio* collector, to return a list of delinquents, under oath or affirmation, to be administered by the county auditor, and the latter was directed to record the return in a book to be kept for that purpose. The power of sale was vested in the auditor, and a legal return was the basis of his authority. The record failed to show the administration of the

¹ 33 Maine R. 199.

² *Hollister v. Bennett*, 9 Ohio R. 83.

oath to the county treasurer, as required by the law ; but a certified copy of the return contained the oath. It was held, that without a sworn return, the county auditor had no power to sell, that this fact must appear of record, and that no secondary evidence was admissible for the purpose of supplying the omission.¹ A prior statute of Ohio required the collector to return, to the county auditor, the delinquent list, "attested by such collector, under oath," but omitted to direct by what officer the oath should be administered. In *Harmon v. Stockwell*,² it appeared that the oath was administered by the county auditor, and the sale was held void. By the court: "As the penalties of perjury were intended to be imposed for a false return, it is clear that the oath must be administered by competent authority. If the auditor, at that time, possessed no such power, the list wants an essential requisite, which invalidates the tax sale. The power to administer oaths is *incidental* to no office except the *judicial*. It must be conferred by statute, either directly, or by implication, or *ministerial* officers do not possess it." The court then examined the several statutes of Ohio, relating to the power and duties of the county auditor, and thus conclude: "We therefore find no authority in any of these statutes, enabling the auditor to administer oaths, except in the specified cases. The grant of authority in those specified cases, sufficiently implies that he possessed it in no other. The return of the collector, therefore, was not under the *securities and sanctions* which the law required ; and this omission is fatal to a title held under such strict principles as a tax sale,

¹ *Minor v. McLean*, 4 McLean R. 138.

² 9 Ohio R. 93.

and supersedes the necessity of looking further into the case." The precept, warrant or list, must contain an accurate description of the lands to be sold, or the sale will be void.¹

In *Kingman v. Glover*,² which was an action of trespass to try title, the plaintiff having deduced upon the trial a regular chain of title, the defendant claimed a seven years' lease under a sale for taxes. The substantial provisions of the law were, that every person should make return of his property for taxation under oath, that if the taxes were not paid when they became due, the collector was authorized to issue a warrant under his hand and seal, directed to a constable, requiring him to levy the amount of the tax by distress and sale of the delinquent's goods or land, and in case the delinquent failed to produce goods, or point out land, then the constable was required to seize the body, etc. The form of the warrant, as prescribed by the statute, was as follows:

"A. B., tax collector of, etc., to ———, constable, etc. Whereas ——— hath been assessed by me, the subscriber, etc., in the sum of ——— dollars and ——— cents, for defraying the charges of, etc., which sum the said ——— hath neglected to pay. Therefore, you are commanded, etc."

The act also provides that if lands are levied on under the warrant, the constable shall advertise and sell an interest "not exceeding the term of seven years." The tax execution in question recited an assessment against "*the estate of Mrs. Hammond*." This was the only informality in the proceedings, and it was insisted that the warrant ought to express upon

¹ *Stewart v. Graffies*, 8 S. & R. 344; *Spiller v. Baumgard*, 4 Lou. R. 206.

² 3 Richardson's Law R. 27.

its face the name of some person liable for the tax, that the heirs of Mrs. Hammond were so liable in this instance, and their names ought to have been inserted. A majority of the court¹ held the execution valid, saying: "The property, whoever may be the owner, is chargeable for the assessed tax, which justifies a levy and sale, if it be not paid; and no injury can be done, in a case like the present, to any citizen who properly respects his obligations to the State, for the payment of his portion of the common charge of the government, or who exercises the most ordinary vigilance over his property. Very strict and technical adherence to forms should not be required from a class of public functionaries, whose duties are not commonly supposed to require any peculiar qualifications, and the term of whose office is so short and precarious, that few derive a knowledge of its duties from experience. If the process which the tax collectors are authorized to issue, does in substance and effect, comply with the provisions of the law, and afford to the owner of property the notice which may be necessary for its protection, formal and technical exceptions may without inconvenience or danger be disregarded." Judges Evans and Wardlaw dissented from this opinion. The law of South Carolina, under which the decision was made, seems to prescribe a most rigorous and summary proceeding to enforce the collection of the tax, authorizing even the imprisonment of the body of the delinquent; the notice of sale is extremely short; and it would seem upon principle that greater strictness ought to be required than in ordinary cases. Who did the estate of Mrs. Hammond belong to? Did she die testate or intestate? If the former, who were the devisees? It

¹ Richardson, Frost and O'Neill.

might be that she made a will and devised her property to executors or trustees to sell, for the benefit of some third person. In the warrant in question, no one is designated as her legal representative. By the very terms of the law and warrant, the tax is a charge upon the person as well as the property of the owner. In the event that no goods or land could have been found, whose body would be liable to seizure under such a warrant? Is the officer at his peril to seize and imprison the right person, under such a vague designation? The same reasons assigned by the court for dispensing with technicality in the form of this warrant, may be applied with equal force to every other proceeding in the enforcement of the revenue laws of every State. It is said that strictness, in this class of cases, is "wholesome discipline;" but the rule laid down in *Kingman v. Glover*, is a bounty upon ignorance, a license to depart from the requirements of the law, and converts every tax collector into a petty legislator—arming him with a dispensing power in cases where it is inconvenient for him to follow the letter of the law. It will not be pretended that even an ordinary execution against "the estate of Mrs. Hammond" could be sustained for an instant. Yet a more lax rule is applied to a warrant to collect a tax, affecting not only the property, but the personal liberty of the delinquent. These reasons detract greatly from the authority of *Kingman v. Glover*, and sustain the opinion of the dissentient judges in that case. It has already been shown that the deed is not evidence of the authority of the officer to sell, and that the *onus probandi* rests upon the party alleging the existence of the authority.¹

¹ Chapters 2 and 3; *vide also Doe ex. dem. Morris v. Himdick*, 4 Blackf. R. 471, note; S. C., *Ibid.* 494.

CHAPTER XIV.

OF THE DISTINCTION BETWEEN CONDITIONS PRECEDENT AND
DIRECTORY REQUIREMENTS.

COURTS do not sit for the purpose of granting favors to parties, but to administer justice to them, according to the law of the land. While this general principle is universally conceded, it has been held that many requirements of a law may be regarded as directory.¹ Lord Mansfield remarks, "that there is a *known distinction* between circumstances which are of the *essence* of a thing required to be done by an act of parliament, and clauses *merely directory*."² No case, however, attempts to point out what that distinction is, so as to establish a general rule of construction which can be relied on, except in relation to the time within which an act may be done. In such cases, the general rule undoubtedly

¹ *Mussey v. White*, 3. Greenl. R. 296; *State Bank v. Buckmaster*, Breese R. 133; *Vance v. Schuyler*, 1 Gilman R. 160; *Day v. Graham*, Ibid. 435; *Taylor v. Brown*, 5 Cranch R. 234; *Craig v. Bradford*, 3 Whea. R. 594; *Stringer v. Young*, 3 Pet. R. 320; *United States v. Kirkpatrick*, 9 Whea. R. 720; *United States v. Vanzandt*, 11 Ibid. 184; *Striker v. Kelly*, 7 Hill R. 9; *Allen v. Parish*, 3 Ohio R. 187; *Lawrence v. Speed*, 2 Bibb R. 401; *Hayden v. Dunlap*, 3 Ibid. 216; *Bealls v. Guernsey*, 8 John. R. 52; *Wiggia v. Mayor of New York*, 9 Paige C. R. 16; *State v. Click*, 2 Ala. R. 26; *Hooker v. Young*, 5 Cowen R. 269; *Merchant v. Langworthy*, 6 Hill R. 646.

² 1 Burr. R. 447.

is, that where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as a directory requirement, unless the nature of the act to be performed, or the language used by the legislature show that the designation of the time was intended as a limitation upon the power of the officer. Where there is nothing in the nature of the power conferred, or in the manner of giving it, which justifies the inference that the time was mentioned as a limitation, it may be exercised after the day fixed. By a directory statute, it is not to be understood that no duty is imposed to do the act at the time specified, in the absence of a satisfactory reason for not then doing it, but simply that the act is valid if done afterwards; while a peremptory law requires the act to be done at the time specified, and at no other.¹ This mode of getting rid of a statutory provision by calling it directory, is not only unsatisfactory, on account of the vagueness of the rule itself, but it is the exercise of a dispensing power by the courts, which approaches so near legislative discretion that it ought to be resorted to with reluctance, and only in extraordinary cases, where great public mischief will otherwise ensue, or important private interests demand the application of the rule. There is no more propriety in dispensing with one positive requirement than another; a whole statute may be thus disposed

¹ *People v. Allen*, 6 Wend. R. 486; *Pond v. Negus*, 3 Mass. R. 230; *St. Louis County v. Sparks*, 10 Missouri R. 117; *Walker v. Chapman*, 17 Ala. R. 126; *Webster v. French*, 12 Ill. R. 302; *Marsh v. Chesnut*, 14 Ibid. 223; *Billings v. Detton*, 15 Ibid. 218; *Thames Manufacturing Co. v. Lathrop*, 7 Conn. R. 550; *People v. Peck*, 11 Wend. R. 604; *Ex Parte Heath v. Roome*, 3 Hill R. 42; *People v. Holley*, 12 Wend. R. 480; *Colt v. Eves*, 12 Conn. R. 243-255; *Gale v. Mead*, 2 Denio R. 232; *Rex v. Sparrow*, Strange R. 1123; *Rex v. Leicester*, 7 B. & C. 6.

of when in the way of the caprice or will of a judge. It is usually much easier to do the act than hunt up reasons for its omission. Besides, it vests a discretionary power in the ministerial officers of the law, which is dangerous to private rights; and the public inconvenience occasioned by a want of uniformity in the mode of exercising a power, is a strong reason for bridling this discretion.¹ It is dangerous to attempt to be wiser than the law, and when its requirements are plain and positive, the courts are not called upon to give reasons why it was enacted.² The remarks of Judge Pope, in *Mayhew v. Davis*,³ are worthy of a place in this connection. In commenting upon the requirements of one of the revenue laws of Illinois, he proceeds to say: "But it is said that some of the requirements of the legislature are only directory, and may be dispensed with. Upon this it may be remarked, that a judge should rarely, if ever, take upon himself to say that what the legislature have required is unnecessary. He may not see the necessity of it, still it is not safe to assume that the legislature did not have a reason for it; perhaps it only aimed at *uniformity*. In that case, the judge cannot interfere to defeat that object, however puerile it may appear. It is admitted that there are cases where the requirements may be deemed directory. But it may be safely affirmed, that it can never be where the act, or the omission of it, can by any possibility work advantage or injury, however slight, to any one affected by it. In such case it can never be omitted." What requisitions are to be deemed

¹ *Vide ante*, 72-79.

² *Dillingham v. Snow*, 5 Mass. R. 557; *Reeds v. Morton*, 9 Missouri R. 878.

³ 4 McLean R. 213.

conditions precedent, and what may be treated as directory, must depend upon a sound construction of the nature and objects of each regulation.¹ No general rule can be laid down for the government of every possible case which may arise. The peculiar phraseology of each statute, the course of legislation upon the particular subject matter, the local policy intended to be advanced, must all be duly considered.² The application of this doctrine to tax laws is denied by many of the cases. It is said that to sustain a tax sale where the officer has failed to conform to the requirements of the statute, "is to *transfer the legislative power to the sheriff, and so allow him to sell land for taxes, not in the manner prescribed by the written law, but according to his private notions of what is right, and would place at his discretion the property of every citizen of the State.*"³ In *Culver v. Hayden*,⁴ the court say: "Where property is affected, or the title to be divested, by the provisions of a special statute, the requirements of the act must be strictly followed. The performance of these acts is the *condition* on which the property is to be divested; and it is not for the court to inquire whether the provisions of the statute are reasonable, whether a compliance with them may not be dispensed with without injury to the owner of the estate, but whether they have been made, and if so, they must be *literally* pursued." And in *McDonough v. Gravier*,⁵ the court say: "Toullier, in his commentaries on the civil law of France, in treating of the nullities of contracts, divides the subject into, 1. Acts done contrary to law; and, 2. Omissions to pursue the

¹ *Hayes v. Hanson*, 12 N. H. R. 284.

² *Monk v. Jenkins*, 2 Hill Ch. R. 12.

³ *Register v. Bryan*, 2 Hawks R. 17.

⁴ 1 Vermont R. 359.

⁵ 9 Lou. R. 546.

formalities required by its provisions. This latter branch is sub-divided into substantial and accidental formalities. When the formality prescribed is founded on natural equity, it is said to be substantial, and its omission carries with it nullity of the act. In our opinion it is of the *essence of justice and natural equity*, that when a *forced sale* of property is made under statutes, *ALL formalities*, which have the *SEMBLANCE OF BENEFIT* to the owner, should be *strictly* complied with." This principle is maintained by the New York authorities.¹

The case of *Torrey v. Millbury*,² endorsed by *Sibley v. Smith*³, lays down the following rules, relative to the construction of this class of statutes: "In considering the various statutes regulating the assessment of taxes, and the measures preliminary thereto, it is not always easy to distinguish which are conditions precedent to the legality and validity of the tax, and which are directory, merely, and do not constitute conditions. One rule is very plain and well settled, that all those measures which are intended for the security of the citizen, for insuring an equality of taxation, and to enable every one to know for what polls, and for what real and personal estate he is taxed, are conditions precedent, and if they are not observed, he is not legally taxed; but many regulations are made by statute, designed for the information of assessors and officers, and intended to promote method, system, and uniformity, in the mode of proceeding, the compliance or non-compliance with which does, in no respect, affect the rights of tax paying citizens; these may be regarded as di-

¹ *Sharp v. Johnson*, 4 Hill R. 99; *Corwin v. Merritt*, 3 Barbour S. C. R. 343; *Atkins v. Kinman*, 20 Wend. R. 249; *Ante*, pp. 79-83.

² 21 Pick. R. 64.

³ 2 Gibbs Mi. R. 498-9.

rectory. Officers may be liable to legal animadversion, perhaps to punishment, for not observing them, but yet their observance is not a condition precedent to the validity of the tax." The Vermont rules upon this subject are thus laid down in *Chandler v. Spear*:¹ "The following principles, or rules for testing the validity of tax titles, appear to be fairly deducible from the reported cases on that subject: 1. Where the statute, under which the sale is made, directs a thing to be done, or prescribes the form, time, and manner of doing anything, *such thing must be done, and in the form, time and manner prescribed*, or the title is invalid; and in this respect the statute must be *strictly*, if not *literally*, complied with. 2. But in determining *what is required to be done*, the statute must receive a *reasonable* construction; and when no particular form or manner of doing a thing is pointed out, any mode which effects the object, with reasonable certainty, is sufficient; and in judging of these matters, the court is to be governed by such rational rules of construction as direct them in other cases." And in *Spear v. Ditty*,² Judge Phelps remarks: "Great nicety has prevailed in relation to these titles; and in cases of doubt the *inverted* maxim seems to have obtained, *ut res majis pareat quam valeat*. They are said to be *stricti juris*—a proceeding *in invitum*, &c. This is true. Still, some degree of reason and sense is to be exercised in determining what right is; and although there may be no equitable consideration to aid such title, still every statute should have a rational interpretation, and a reasonable effect. We ought not to discard those aids, which guide us in other cases; nor by an unreason-

¹ 22 Vermont R. 388.

² 8 Vermont R. 419.

able and senseless nicety, defeat a solemn act of the legislature. It is, however, admitted, that in interpreting these statutes, we should consider the title to be acquired under them as *stricti juris*, and should require a full and complete compliance with the requisitions of the statute. Before the title of the owner is divested by such a proceeding, we should insist upon everything *tending to the security of the owner, which is either prescribed by the terms of the act—brought within it by a rational and strict construction—or which, in the nature of the transaction, is necessary to give ample effect to every safeguard which the legislature have endeavored to throw around the subject.* But it is not our duty to legislate—to create artificial and unreasonable difficulties; nor by over nice and unmeaning technicality, without any rational purpose, to *convert the proceeding into an IDLE CEREMONY.*” This seems to be the safer and most equitable rule to adopt; a requirement which tends to the security of the owner, or which possesses the semblance of benefit to him, should be faithfully complied with; while those which possess no intrinsic merit, and the omission of which works no manner of injury to the owner of the estate, ought not to defeat the title of the purchaser. Such seems to be the true principle to be deduced from the decided cases, if it be once conceded that *any* provision of a statute may, under any circumstances, be regarded as directory. The application of that principle to the facts of each particular case, are shown in those parts of this work which treat of the different requirements. The design of this chapter being simply, to lay before the profession those general rules, which seem to aid in the investigation of questions of this nature.

CHAPTER XV.

OF THE SALE OF THE LAND.

THE general principles relative to the power of sale have already been fully explained. It has been shown that the authority of the officer to sell depends upon the regularity of the anterior proceedings, and in most instances, upon a special precept authorizing him to proceed; and it has also been shown, that where the sale is conducted by the wrong officer or person, or where the proper officer makes the sale before his power attaches in point of time, or where he exercises the power after it has become *functus officio*, the sale is void.¹ But there are important details connected with the auction itself, and the duties of the officer entrusted with the conduct of it, which constitute the subject matter of this chapter.

1. The sale must be a *public*, and not a *private* one. The object of the law is to secure a fair competition at the biddings. If a secret sale could be sustained, the policy of the legislature would be defeated in this respect. No statute is remembered which does not, either in express terms, or by necessary implication, require the sale to be at public vendue. A sale made

¹ *Ante*, Chapter 2, p. 46; Chapter 3, p. 84; Chapter 13; *Hughey v. Horrell*, 2 Hammond R. 231; *Thompson v. Rogers*, 4 Lou. R. 9; *Usher v. Taft*, 33 Maine R. 199.

in violation of the letter or policy of the law, in this particular, is void. In *Keene v. Houghton*,¹ the statute required the collector to sell non-resident lands to the highest bidder, at public auction, after giving due notice, etc. The land in question was struck off to Isaac Tyler, for the taxes and costs, he being the highest bidder. Afterwards, and before the proceedings were returned and recorded, in pursuance of the statute, the defendant Houghton was substituted as a purchaser in lieu of Tyler; and the sale was so returned. A deed was executed and tendered by the collector to Houghton, which the latter refused to receive, because he was advised that the proceeding was illegal, that the collector had no authority to make the substitution. Keene, the collector, thereupon sued Houghton for the purchase money, and the court held that he was not entitled to recover. Shepley, J.: "In the execution of a power given by statute, there must be a strict conformity to its provisions, or the proceedings will be ineffectual. The person authorized cannot adopt a different mode of proceeding, which he may judge would accomplish the same object in a different manner, and be more beneficial to those interested. The collector in this case is authorized to deed only to the highest bidder, that is, the person who would bid the highest price for the land by taking the least quantity of it, and pay the amount due; and he only could acquire a title to the land by such a sale; for a sale, not in conformity to the provisions of the statute, could not give a title. The bill of exceptions states that Isaac Tyler was the purchaser at the sale; and it does not appear that he refused to comply with the conditions

¹ 19 Maine R. 368.

of sale, or that he acted as the defendant's agent, or assented to the transfer of his bid to the defendant; and the plaintiff had no right to substitute the defendant for Tyler as the purchaser." In this case it appeared that the defendant was not present at the sale; if he had been there, and declined bidding, and afterwards, by agreement with Tyler and the collector, been substituted as the purchaser, the transaction would have been a fraud upon the law, as its direct tendency would have been to destroy competition at the sale.

2. The sale must take place at the precise time fixed by the law, or notice, otherwise it will be void.¹ The twenty-sixth section of the revenue law of Illinois of February 26, 1839,² contemplates a notice of the application for a judgment upon the delinquent list, and of the sale, in the same advertisement, and fixes the day of sale "on the second Monday next succeeding the said TERM of the said circuit court," at which the application is made, and in which the judgment is rendered; and the law further provides "that it shall be the duty of the clerk, within five days after the adjournment of said court, to make out under the seal of said court, a copy of the collector's report, together with the order of the court thereon, which shall hereafter constitute the process on which all lands shall be sold for taxes, and deliver the same to the sheriff of his county; and the sheriff shall thereupon cause the said lands to be sold on the day specified in the notice, given by the collector, for the sale of the same, etc.;"³ and the statute further declares that the deed of the sheriff shall

¹ *Ronkendorff v. Taylor*, 4 Peters R. 349; *Conrad v. Darden*, 4 Yerger R. 307; *Moore v. Brown*, 11 Howard U. S. R. 414.

² *Ante*, pp. 227-8.

³ *Ante*, p. 228, Sec. 27.

be *conclusive* evidence "that the sale was conducted in the manner required by law." In the more populous counties of the State, the session of the court continued from two to six weeks; in the smaller counties the court did not sit longer than a week, and in some for only a few days.

The question necessarily arose upon the construction of this statute, whether the words "second Monday next succeeding the term of the court," had relation to the first day of the term, or to the day of the adjournment of the court. In counties where the term of the court was fixed for one week only, it was immaterial which period of computation was adopted, as in either case the day of sale would be certainly known to all persons interested in the proceeding. But where the law authorized the court to continue the term beyond the period of one week, if the time was computed with reference to the day of adjournment, these consequences would follow: 1. The owner and those desirous of attending the sale would be bound to take notice at their peril of the matter of fact as to when the court actually adjourned; and, 2. The sale would not take place uniformly throughout the State. In the small counties, the sale would be on the second Monday succeeding the commencement or end of the term—(the term invariably commencing on Monday, or some intermediate day of the week, and ending at twelve o'clock on Saturday night)—while in the larger counties, the day of sale would depend upon the time of the adjournment of the court. On the other hand, as the clerk was authorized and required to deliver the precept of sale to the sheriff, *within five days after the adjournment of the court*, it seemed to

many that the day of adjournment was the time for the commencement of the computation. There seemed to be strong reasons for either construction; for holding that the sale would be legal on the second Monday succeeding the *commencement* of the term, or on the second Monday after its *adjournment*. The ambiguity in the language of the law gave rise to a diversity of practice under it; and the day of sale floated between these conflicting opinions, until the passage of the act of 1845,¹ which fixed "the fourth Tuesday succeeding the *commencement* of the term," as the day of sale. The varied practice, however, under the old law, gave rise to litigation, and the question at length came before the supreme court, at the December term, 1845, in the case of *Bestor v. Powell*.² This case came up from Peoria county, where the circuit court commenced its term on the 15th, and adjourned on the 28th day of April, 1841. The precept upon the tax judgment was issued on the 24th of that month, while the court was in session; and the sales commenced on the 26th and ended on the 29th day of April, so that no Monday intervened between the close of the term and the day of the sale. The court held the sale valid, upon the ground that by fiction of law the term constituted but one day, and that every act of the court had relation to that day; but that without resorting to that fiction, the adjournment might be presumed to follow immediately after the entering of the judgment upon the tax list, as far as that proceeding was concerned; the court in the exercise of this special and summary power, being regarded for for the purposes of this question, *quo ad hoc* a special

¹ R. S. 444, Sec. 47.² 2 Gilman R. 119.

tribunal, the powers of which ceased upon the rendition of the judgment, except so far as it was necessary for the issuing of the precept to enforce the judgment and to enable the sheriff to make his return of the sale. However, the court intimated an opinion that a sale on the second Monday succeeding the adjournment of the court would have been equally valid; but inasmuch as this question was not fairly presented by the record in that case, it has been very properly regarded as a *dictum* of the judge who delivered the opinion.

In *Hope v. Sawyer*,¹ the question whether such a sale could be sustained, was directly before the court, upon this state of facts: the judgment was rendered on the third Monday of September, 1841, being the day of the commencement of the term of the circuit court, the precept issued October 18, 1841, and the sale took place October 19, 1841, which was the second Monday succeeding the *adjournment* of the court. The sale was held void. Treat, C. J.: "Ought the sale to take place on the second Monday succeeding the first day of the term, or on the second Monday after the close of the term? The opinion was expressed, in the case of *Bestor v. Powell*, that the former day was the one intended by the legislature; and upon a further consideration of the question, we are well satisfied that such is the proper interpretation of the statute. It was, however, intimated in that case, that a sale made on the latter day would be valid. We cannot assent to such a conclusion. It was evidently the design of the legislature to prescribe an uniform mode for the sale of land for taxes. The time designated for the sale was to apply to all

¹ 14 Illinois R. 254.

cases. The sale was to be made on the second Monday after the rendition of the judgment. The collector was not vested with any discretion, as to the day of sale. The law fixed the time, and it was his duty to pursue it. If he could properly make sales on both of the days indicated, it would be very difficult to hold that he might not sell on any other day. In requiring the sale to take place on the second Monday after the commencement of the term, the day of sale was made certain. The time when a term of the court shall commence, is a matter of positive law; and the public would, therefore, know to a certainty when the sale would be made. Owners and bidders would have specific information of the day of sale. Sales for taxes would uniformly follow within two weeks from the rendition of the judgments. A different construction would leave the time of sale uncertain, and contingent. It would be made to depend on the fact, when the term of the court might end. The day of sale could not be known, until the court had actually adjourned. It could not be ascertained from the report of the collector. And sales would not be made uniformly within a certain time after the judgments were entered. In some counties the court remains in session for two or three days only; in others for as many weeks; and in others for a still longer period. The object of the collector's notice was to apprise owners of the proceedings against their property, and secure competition at the sale. That object would be, in a great degree defeated, if the sale could be made on the second Monday after the close of the term. The effect would be to lessen competition at the biddings, and sacrifice the interests of the owners of property ordered to be sold. The

direction to the clerk to issue the precept within five days after the adjournment of the court, does not necessarily indicate the second Monday after the close of the term, as the proper day of sale. It was said, in *Bestor v. Powell*, ‘By fiction of law, the term is one day, but as the judgment and proceedings on these applications are entered and kept in a separate record, without resorting to the fiction, the adjournment may be presumed to follow immediately upon the entering this judgment, as to this proceeding.’ The revenue law imposed this new and peculiar jurisdiction on the court, and required it to be exercised before the court proceeded to other business. It was clearly the design of the law that the judgment should be entered on the first day of the term. In legal contemplation, it is entered on that day; for all the purposes of the revenue law, the court may well be considered as at an end when the judgment is entered. The sale in question was not made on the second Monday after the rendition of the judgment, and was therefore invalid.” This doctrine was reaffirmed in *Polk v. Hill*,¹ where the judgment was entered May 13, and the sale took place on the third day of June thereafter. The Ohio statute of January 30, 1820,² provides, “that previous to the sale of any land, &c., it shall be the duty of the auditor to advertise, &c., which advertisement shall set forth the time and place of sale, &c., and the auditor shall attend at the time and place of sale, and proceed to sell, &c., and if any person or persons to whom the same may be struck off, shall refuse to pay, &c., the auditor shall proceed to offer the same from time to

¹ 15 Illinois R. 130.

² Sec. 7.

time, for the space of three days in succession, unless previously sold." In the *Lessee of Wilkins' heirs v. Huse et al.*,¹ which was an action of ejectment, the plaintiff deduced a regular chain of title, and unless that title was divested by a tax sale, under which the defendant claimed, he was entitled to recover the premises in controversy. The evidence was that the land was advertised, in due form of law, to be sold on June 1, 1824. From the return of the auditor, it appeared that the land was in fact sold, June 2, 1824, and no reason was assigned in the return, why it was not sold on the day specified in the notice. The circuit court charged the jury that the sale was illegal; a verdict was thereupon found for the plaintiff, and the defendant moved for a new trial upon the ground of a misdirection of the judge, upon the point of law relative to the legality of the sale. The motion was overruled, the court holding the sale illegal. Hitchcock J.: "The objection made in the present case, is to a proceeding (under the law of Ohio, requiring a judgment,) after judgment. Whether this objection is well made, depends upon the seventh section of the before recited act, and more particularly upon the construction of the last clause of the section. Now the question arising, is as to the intention of this last clause. Is it to give the auditor three days in which to sell all the lands against which judgments are rendered, should so much time be necessary? or must he offer all which he does offer, upon the day appointed for the sale, and if there is not time to sell the whole, suspend the proceedings as to those which cannot be offered for want of time, *except* as to such as have been struck off, but upon which bids

¹ 10 Ohio R. 139.

have not been paid? I must confess that my mind inclines strongly to the former construction. This, however, is not the most obvious construction. Giving this clause, in connection with the whole section, such construction, and the intention is, that all the land must be offered for sale on the first day named in the advertisement. But in the event that any purchaser shall fail to pay the judgment and costs, then the county auditor is authorized to offer the same land on the second and third day, if not previously sold; and this is the construction which a majority of the court hold that it must receive. Giving the section this construction, it would seem to follow, of course, that if the land was sold on a day different from that named in the advertisement, *some reason consistent with the law must be shown, why it was so sold, and this should appear from the return of the officer effecting the sale.* The object of an advertisement is that the public may be notified of the time and place of sale, that opportunity may be given for competition. The object is not attained if an officer may advertise on one day, and sell on another. Such a proceeding cannot be sustained." In *Northrup v. Devore*, and *Adams et al. v. Bainter*,¹ the defendants relied upon tax titles, derived under the statute of Ohio, of 1822, which required a judgment, precept, advertisement, sale, deed, return and confirmation. The judgment was rendered at the August term of the common pleas court, 1824. The land was sold, November 10, 1824; at the December term, 1824, an order, confirming the sale, was entered by the court, reciting that a sale was made on the 10th, 11th and 12th days of *December*. The order of confirmation

¹ 11 Ohio R. 359.

was dated December 12, 1824. The sale and order of confirmation were held void. Lane, C. J.: "This mistake in the description of the time of sale, appears to us a fatal defect in the defendant's title. Although it is argued that no other sale was made, except that on the 10th day of November, and the time is probably misdescribed through the inadvertence of the clerk, yet, as the order stands, it affords no evidence that the sale of November 10, was ever acted upon by the court."

3. It is equally important that the sale should be made at the *place* designated in the advertisement. If the notice is of a sale to take place at the court-house door, and it is made at some private room or house in the county town, or elsewhere in the county, there can be no question but that the sale is void. It is just as important that the owner should know *where* to go in order to arrest the sale by the payment of the tax, and that those desiring to purchase should know where to find the officer exercising the power of sale, as it is that the time named in the advertisement should be literally adhered to in the making of the sale. There are no express adjudications upon this question, but it is conceded by a respectable authority,¹ and indeed seems a self-evident proposition.

4. Where the officer intrusted with the power of sale, is authorized by the statute or common law, to constitute and appoint deputies, it seems that a sale by a deputy is valid, although the power is not expressly delegated to him, upon the principle that all of the ministerial duties of an officer may be performed by deputy.²

¹ *Doe ex. dem. Kelly v. Craig*, 5 Iredell R. 129.

² *Chapman v. Bennett*, 2 Leigh R 329.

5. It is presumed that without express authority, conferred by statute, to adjourn a sale from day to day, the officer must sell all of the lands embraced in his list on the day named in the advertisement, or suspend the sale, so far as those which remain unsold are concerned. Still, it is difficult to perceive any substantial reason why the general principle—that when a power is conferred by statute, every incident essential to carry the power into complete effect, goes with it by implication¹—does not apply. Where the law fixes the day of sale, and appoints an officer to conduct it, and is silent as to the power of adjourning the sale, and it is impossible, on account of the great number of parcels of land upon the delinquent list, for the officer to sell the whole in one day, the power of continuing the sale to another day would seem to be necessarily implied, in order to prevent a failure of justice, in which the State is essentially interested. She might be deprived of the greater portion of her revenues unless such a power was sustained. And no injury could possibly accrue to the owners of the land, if the adjournment was publicly announced by the officer, at the close of the first day's sale. But in the case of *Sibley v. Smith*,² it was held that this principle of taking power by implication, was not applicable in the construction of this class of statutes; that being in derogation of the common law, and authorizing proceedings, the effect of which is to divest the citizen of his title to real estate, such statutes should be construed strictly, although made for the public benefit; that their provisions cannot be enforced farther

¹ *Mitchell v. Maxwell*, 2 Fla. R. 594; *Wiherspoon v. Dunlap*, 1 McCord R. 546; 12 Co. R. 130-1; 9 Bac. Abr. R. 220, ed. 1846; 10 Peters R. 161; 18 John. R. 418; 2 Cowen R. 199, 233-5; 1 Kent. R. 465, note; 2 Scam. R. 79, 83.

² 2 Michigan (Gibbs) R. 490.

than they are clearly expressed ; that the officers acting under them can take no power that is not expressly delegated to them ; that they can assume no power by implication, and that when their acts are not clothed with the authority of the statute, they are of no validity whatever. The same principle is affirmed in other cases.¹ In Pennsylvania the statute authorized the adjournment of the tax sale "from day to day," and a sale made on an adjourned day, without a day intervening between that and the first day of the sale, was held valid, upon the ground that such had been the uniform usage in the State in conducting sales made under the law.²

6. The sale to be valid must be made to the "highest bidder," which ordinarily means the person who offers to pay to the collector, for the land put up, the largest sum of money. This is the rule in Pennsylvania ; but the purchaser simply pays into the treasury the amount of the tax, interest and costs actually due upon the land, and executes and delivers to the treasurer a bond for the residue, usually called a "surplus bond." This is intended for the benefit of the owner of the land in case he submits to the sale, and is willing to receive the surplus.³ In most of the States, however, the highest bidder is he who will pay the taxes, interest and costs due upon the tract offered for sale, for the least quantity of it. There is no way of securing competition at a sale but by selling the entire parcel upon which the tax is assessed, to the person who will pay the highest amount of *money* for it, or pay the arrears

¹ *Doe v. Chunn*, 1 Blackf. R. 336-8 ; *Van Horn's Lessee v. Darrow*, 2 Dallas R. 216 ; 4 Hill R. 99.

² *Burns v. Lyon*, 4 Watts R. 363.

³ *Supra*, Chapter 17.

upon the land for the least quantity of it. A violation of either rule works an injury to the owner of the land ; in the one case the surplus money to which he is entitled under the law is reduced in amount ; and in the other, a greater quantity of his land is sold to pay the tax than the law contemplates. A statute of New Hampshire required the officer who conducted the sale, to make out and return a complete record of his proceedings. Where the officer failed to state in his return that he sold the land "to the highest bidder," the sale was held void.¹ And oral evidence would undoubtedly be inadmissible for the purpose of supplying the omission.² The form of the deed prescribed by the law of Illinois, and used in that State up to 1839, contained the recital : " And whereas, at the time and place aforesaid, A. B. offered to pay the aforesaid sum of money for (the whole tract or a part thereof, as the case be,) *which was the least quantity bid for.*"³ The same recital is substantially contained in all the forms prescribed and used since that time.⁴ Similar recitals are required in the forms of deeds used in other States. A failure to recite the fact that the grantee in the deed was the highest bidder, would render the deed void ; and especially would it be deprived of its legal effect as evidence, in those States where a deed executed in the form prescribed is declared to be *prima facie*, or *conclusive* evidence of a title in the purchaser at the tax sale.⁵ The sale of a tract of land for *more* than the amount due upon it, is not void for that

¹ *Proprietors of Cardigan v. Page*, 6 N. H. R. 182.

² *Kellogg v. McLaughlin*, 8 Ohio R. 114.

³ *Laws 1826*, pp. 78-9.

⁴ *Ante*, 232.

⁵ *Per Judge Tucker in Kinney v. Beverly*, 2 Hen. & Munf. R. 341 ; *Mazy v. Clabaugh*, 1 Gilm. R. 26.

reason ; under a statute which required a sale to the person who would pay the taxes for the least quantity of the land upon which it was assessed, the owner is not prejudiced by such a sale, inasmuch as he is only bound to pay the tax, interest and cost due upon the land when he redeems from the sale.¹ And under the same statute it has been held, that where the *whole amount of the tax due upon the land* was not bid, the sale though void in the hands of the original purchaser, will be sustained in favor of a *bona fide* grantee, claiming title under such purchaser, without notice of the irregularity in the sale.²

7. The sale must be for *cash*—if credit is given to the purchaser it is absolutely void. Thus, in *Cushing v. Longfellow*,³ where the proof was that the officer who made the sale, gave credit to the purchaser for the amount of his bid, the sale was held invalid. By the court : “ This he was not authorized by law to do. He should have sold for cash down. Public agents authorized to make sales, in the absence of any express authority to the contrary, can do no otherwise. Those who deal with them are bound to take notice, that such is the case, and they become privy to the erroneous proceedings. If one deals with a private agent even, who has not an express or implied authority to sell on credit, the title to any article purchased of such agent will not vest in the vendee as against the principal. Public agents can seldom, if ever, derive authority from implication.” The same principle was applied in *Illinois v. Delafield*,⁴ where the State of Illinois authorized a loan, and appointed

¹ *Peters v. Heasley*, 10 Watts R. 208.

² *Divinney v. Reynolds*, 1 Watts & Serg. R. 328.

³ 26 Maine R. 306.

⁴ 8 Paige C. R. 527 ; S. C., 2 Hill R. 159.

agents to sell the bonds "*at not less than their par value.*" A sale was made nominally at par, the State bonds drawing interest from the date of their sale, the proceeds of the sale to be paid to the State by installments. The sale was held void upon two grounds. 1. The bonds did not bring their par value. 2. They were sold upon *credit*. And in *Dickinson v. Gilleland*,¹ it was held that a sheriff, in permitting a redemption by a judgment creditor, of land sold under execution, acts under a delegated and special authority, and must strictly comply with the law; that he cannot receive a less sum than the law requires to redeem, *nor can he give credit for the redemption money* to the person who desires to redeem. Even the power of a factor to sell upon credit depends upon an express authority from his principal, or the usage of trade in the particular business with respect to which he is agent.² It therefore seems clear, as well upon principle as by the adjudged cases, that an officer intrusted with the power of selling land for taxes due upon it, cannot sell upon credit, unless he is expressly authorized, as in Pennsylvania, where the purchaser gives a surplus bond for a portion of the purchase money. But where there is no agreement, *before the sale*, between the officer and bidder, that a credit shall be given for the whole or any portion of the bid, and after the sale the purchaser pays a part of the purchase money, and gives to the officer his note or other obligation for the payment of the

¹ 1 Cowen R. 498.

² *Forrestier v. Bordman*, 1 Story R. 43; *Van Alden v. Vanderpool*, 6 John. R. 69; *McKinstry v. Pearsall*, 3 Ibid. 319; *Robertson v. Livingston*, 5 Cowen R. 473; *Hapgood v. Batcheller*, 4 Metcalf R. 573; *Greely v. Bartlett*, 1 Greenl. R. 172; *Scott v. Surman*, Wille R. 400; *Goodenow v. Tyler*, 7 Mass. R. 36; *Burrill v. Phillips*, 1 Gallison R. 360; *Houghton v. Matthews*, 3 B. & P. 489; *Myers v. Entriken*, 6 Watts & Serg. R. 44.

residue at a future time, the sale will be maintained. Such were the facts in *Longfellow v. Quimby*,¹ where the court say: "This is unlike a case where the stipulation is made before the sale that a credit is to be given the purchaser. Here the officer, as such, was accountable for the whole sum for which the land was sold, and the taking of the note for a portion of the purchase money was a matter between the purchaser and himself, in his private character." The same principle would undoubtedly apply where no portion of the purchase money is paid, but the officer accepts the promise of the purchaser in satisfaction of the bid. The officer in that case would be liable to his superiors, and must seek his remedy upon the promise; and if no agreement to sell upon credit appears to have been made before the sale, he will be permitted to recover.

8. Where a part of the land sold is liable to sale, and the residue is not, the sale is void *in toto*. Thus, in *Moulton v. Blaisdall*,² the law required the collector to advertise and sell *unimproved* lands of non-resident proprietors, and improved lands of resident proprietors; and in case of improved lands belonging to a resident of the State, but who resided out of the town in which the land was situate, the collector was directed to give an *additional notice*, in writing, to the owner of the land before making the sale. The facts of the case were, that the land in question belonged to a person who did not reside in the town where the land lay, and the tax was assessed; *a part of which was improved*, and the rest *unimproved*. There was no proof of a notice in writing to the owner. The whole parcel of land was taxed and sold as one estate. By

¹ 29 Maine R. 190.

² 24 Maine R. 283.

the court: "The whole, both improved and unimproved, being sold at auction for one integral sum, upon one bid, the sale cannot be good in part, and bad in part; but if not valid for the whole, the title entirely fails." The sale was thereupon held void, upon the ground that one who owned improved land, but resided out of the town, was entitled to the additional notice mentioned in the statute; that the fact that a portion only of the tract in question was improved, made no difference. The owner may have been prejudiced by the sale, and the law will presume that he was. The advertisement was simply a *constructive* notice. If the *actual* notice contemplated had been given to the owner, he would probably have paid the tax assessed upon the entire tract. He, at least, would have had an opportunity of doing so. The same principle was decided in *Hayden v. Foster*.¹ So, where divers taxes are assessed, some of which are legal, and the residue *illegal*, the sale cannot be upheld *pro rata*, but the entire sale falls to the ground.² The rule is, that where a grant, an instrument or act, is void in part by the statute law, it is void for the whole. It has been quaintly said, and oftentimes repeated, that "the *statute law* is like a tyrant; when he comes he makes all void; but the *common law* is a nursing mother, making only void that where the fault is, and preserving the rest."³ But even the common law rule, which puts such a construction upon a transaction as to sustain the legal, and reject

¹ 13 Pick. R. 492.

² *Ante*, p. 192.

³ Dwarries Stat. 739; Hobart R. 14; 2 Wilson R. 351; 1 Saund. R. 66 a; 8 East. R. 231, 236; 11 Ibid. 165; 13 Ibid. 87; 15 Ibid. 440; 7 T. R. 201; 8 Ibid. 411; 5 Taunt. R. 727; 5 N. H. R. 196; 6 Ibid. 225; 1 John. C. R. 339; 8 John. R. 253; 14 Ibid. 458, 465; 5 Cowen R. 162, 548; 15 Mass. R. 159; 3 Bibb R. 500.

the illegal part, is only applicable to cases where, from the nature of the act, a severance of the good from the bad part, can be made. A severance is impossible in the case of an illegal tax. The same principle was applied in *Wallingford v. Fiske*,¹ where several parcels of land lying in one township were assessed together as one tract, for the year 1813, and assessed separately for the years 1814, 1815, 1816 and 1817, and the whole were sold *en masse* for the five year's tax thus assessed upon them; the sale was held illegal, upon the ground that the sale could not be regarded as legal as far as it was based upon the assessment of 1813, and void as to the other years.

9. The sale must be according to the parcels, and description contained in the list and the other proceedings, or it cannot be sustained. Especially must it conform to the list, as that constitutes the basis of all the subsequent proceedings. *The course pursued must be consistent with itself throughout the entire proceeding.* Any variance in this respect will be fatal to the validity of the sale. The reason is obvious; the authority of the officer to sell is derived from the existence and regularity of the anterior proceedings. If those proceedings are irregular, he possesses no authority at all; if regular, the law confers upon him no power to change them. He acts at his peril in making a sale if they are irregular, and if regular, they constitute his only guide in advertising, selling, and conveying the land affected by them.² In *Pikin v. Yaw*, the judgment was against *eight* town lots, for an *aggregate* sum; *two* only were sold, and the sale was held void. *Willey v. Scoville* was a case where *nine ten* acre lots were assessed *en masse*, instead of *severally*;

¹ 24 Maine R. 386.

² *Pikin v. Yaw*, 13 Ill. R. 253; *Willey v. Scoville*, 9 Ohio R. 43.

the sale, on the contrary, was a several one, for the tax due upon each lot, and it was held void. In *Andrews v. Senter*,¹ it appeared that two lots were listed and advertised for sale separately, but the collector—as it appeared from his return of the sale—sold them together for the aggregate sum due upon both, and the sale was held void. The same principle was sustained in *Morton v. Harris*.² And in *Walkingford v. Fiske*,³ which was a writ of entry, wherein the defendant claimed under a tax sale, it appeared that all of the several parcels of land lying in township number three were listed and assessed in the names of the several owners. The warrant stated the gross sum due upon the whole township, the return of sale showed a sale of the entire township to three persons for the sum of \$68,53, and the execution and delivery of a deed accordingly. The sale was held void. By the court: “The legislature were careful that, so far as it could be done, each parcel of land should be exclusively holden for the tax with which it was charged; that no unnecessary inconvenience should arise from advertising and selling in gross, different parcels of an estate, in which different interests might exist; that on a redemption of the title conveyed upon such sale, each individual might obtain his own land by the payment of the tax thereon, and the expense arising from the sale, thereby avoiding the disputes which would grow out of a claim for contribution, where one tract was burdened with the taxes upon itself and others also.”⁴ Each right, number of lot, or division, must be advertised and separately sold at public auction.” It is also held that the fact

¹ 32 Maine R. 394.² 9 Watts R. 319.³ 24 Maine R. 386.⁴ 13 Pick. R. 492.

that the several lots, tracts or parcels, belong and are assessed to the same person, does not dispense with the law, or excuse a deviation from it.¹ The law contemplates a sale in *legal* subdivisions, and will not tolerate any act which tends to create confusion in the land systems of the respective States, and of the United States, and thus destroy the legal identity of a parcel of land, known to the law *only* by specific metes and bounds.

10. Where a tract of land is assessed against tenants in common, and one of them pays the tax on his undivided share, the interest of the other may be sold to satisfy the residue of the assessment.²

11. The question has been raised in several cases, but not decided, whether, where the law is silent as to the mode of locating the land sold, it is competent for the officer to sell and convey a certain number of acres, out of a tract, without designation by metes and bounds, and thus make the purchaser at the tax sale a tenant in common with the owner of the residue; and also, whether a sale of the undivided moiety can be sustained.³ There would seem to be no difficulty in answering these questions. The only instance where a tenancy in common can be created by mere operation of law, is where a dissolution of an estate in joint-tenancy or coparcenary takes place; and the only other mode of creating one is by an *express* limitation in a deed to two or more persons.⁴ It cannot be created by implication, where the statute itself fails to point out the *modus operandi* whereby it may be affected, not only because it is inconsistent

¹ *Shimin v. Inman*, 26 Maine R. 228.

² *Runkendorff v. Taylor*, 4 Peters R. 362.

³ *Currie v. Fowler*, 5 J. J. Marsh. R. 145; *Waldron v. Tuttle*, 3 N. H. R. 340.

⁴ 2 Bl. Com. 192-3.

with the general principles of law relative to the origin of such rights, but because, as we have already seen, the officers who execute the power of selling land for taxes can exercise no implied power whatever. He acts in hostility to the owner of the estate, and not as his agent, and he must pursue his authority literally. There is, however, no statute regulating this class of sales which are so ambiguous as to present such a question. The authority usually conferred is to sell *the land* upon which the tax is due; or *so much* thereof as may be necessary to satisfy the charge; or to sell a *certain interest* less than a freehold out of the estate; or to sell to one who will bid the *least quantity* to be located on a particular side of the tract, or in a particular corner of it; or to sell as many acres of the tract as may be sufficient to satisfy the tax, the boundaries of which are to be ascertained by an official survey prior to the consummation of the purchaser's title. No such difficulties as suggested can possibly arise in the construction of the power of sale under the character of statutes above indicated. All of them evidently contemplate a sale of the entire tract, or interest of the party against whom the tax is assessed, or a particular portion to be designated by metes and bounds, or other certain description. This question was directly decided in *Loud v. Peniman*.¹ The act of Congress of 1815, provided that where property, liable to the direct tax, should not be divisible, so as to enable the collector by a sale of a part thereof to raise the whole amount of the tax, with all costs, &c., the whole should be sold, *and the surplus paid to the owner*. The land in question was susceptible of such a division as

¹ 19 Pick. R. 539.

to bring the amount due, but the collector sold an *undivided half* of the tract; and the sale was held void. By the court: "The collector should have sold a part of the land, *by metes and bounds*, sufficient to have paid the taxes, &c., as it is admitted he could have done; or if that could not have been done, he should have sold *the whole*, and have accounted for the surplus according to the requisition of the statute. It is clear that where the estate was capable of division, the officer had no authority to sell an *undivided part* of it, but only so much as would be sufficient to pay the tax, &c., to be set off separately from the rest." It is not in the power of any officer, acting under a special statute, to thrust a cotenant upon the owner of an estate in severalty against his will.¹

12. Where several parcels of land, belonging to the same person, are separately assessed, each parcel is liable for its own specific tax and no more. The lien created by the statute is upon each tract for its own tax, and it cannot therefore be sold to satisfy the tax due upon the others. Thus, in *Hayden v. Foster*,² where twenty-two distinct parcels of land, owned by one individual, and situate in the same town, were valued and taxed separately, but one of them was sold to pay the tax upon all of them, the sale was held void. The court remarked: "So numerous and various are the collateral, derivative and dependant interests in estates, which are liable to taxation to one common owner having a general property, that it would be attended with the utmost inconvenience, and produce a great confusion of rights, if the whole tax could be charged upon one estate." In *Baskins v.*

¹ *Hodge v. Wilson*, 12 S. & M. R. 498.

² 13 Pick. R. 492.

Winston,¹ several tracts of land, containing in all 1,874 acres, were assessed and valued separately, as the property of Isaac Lane, a part of which belonged to him and the rest belonged to Winston, the defendant, but were illegally assessed in the name of Lane. The aggregate tax was \$33,95, for which the lands were sold. The sale was held void. By the court: "We are clearly of opinion that the tax collector could not make a valid sale of land belonging to Winston, although assessed to Lane, for the purpose of paying taxes due by and assessed to Lane for other and different tracts belonging to him. So to hold would not only subject a man's property to the payment of taxes not due upon it, but would appropriate the property of one person to pay the debts and charges which the State might have against another. We cannot suppose the legislature ever intended such an act of injustice, and must therefore declare the sale made in this case invalid."

13. The quantity of land that may be sold by the officer depends upon the phraseology of each particular statute. The statute of New Hampshire required that *so much* of the delinquent's estate should be sold, "as will be sufficient to pay the taxes and incidental charges" upon it. In *Ainsworth v. Dean*,² the whole tract was offered and struck off to the first bidder. The court held the sale void, saying: "No regard *appears* to have been paid to this provision in the sale, and *no reason* is given why the law was not complied with, if indeed any reason could be considered as sufficient. The *whole* lot was advertised and sold for the taxes and costs." But in *Ives v. Lynn*,³ where it did not appear affirmatively in the deed, or

¹ 24 Miss. R. 431.

² 1 Foster R. 400.

³ 7 Conn. R. 505.

return of sale, that no more land was sold than was necessary to raise the amount of taxes due upon the entire tract offered, the court held that it was a presumption of law that the collector performed his duty, and conducted the auction fairly and properly; and in the absence of proof rebutting this presumption, the sale was sustained as far as this point was concerned.

The statute of Georgia provided that the collector should sell the land of the defaulter, or "*so much thereof* as will pay the amount of the taxes due, with costs." In *Stead's Executors v. Course*,¹ it appeared that a sale was made, under this statute, of an entire tract of 450 acres, but it did not appear how much taxes were due upon the land. In deciding against the title, upon this state of facts, Chief Justice Marshall said: "The sale ought to have been of so much of the land as would satisfy the tax in arrear. * * * If the whole tract of land was sold when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector *unquestionably exceeded his authority*." And where the statute was silent as to the quantity which might be offered and sold to pay the taxes, the supreme court of Indiana held that, upon general principles, a sale of a greater quantity than was necessary to satisfy the tax, where the land was susceptible of a division, or a sale in smaller parcels, was illegal and void.² The court, after quoting the case of *Stead v. Course*, which arose upon the construction of the Georgia statute, and approving of the decision of Judge Marshall, say: "The rule must be the same, without any positive law

¹ 4 Cranch R. 403.

² *O'Brien v. Coulter*, 2 Blackf. R. 421.

for the purpose. It rests upon principles of obvious policy, and universal justice." This is clearly the correct rule of law. It was held, in *Wordye v. Bailey*,¹ that where a sheriff, under an execution for five shillings, seized and sold five oxen, each of the value of five pounds, he became a trespasser *ab initio*. And it has been repeatedly decided, in this country, that an excessive levy and sale of personal property subjects the officer to an action.² So it has been adjudged that where a sheriff sells more land than is necessary to satisfy the execution, the land being susceptible of advantageous division, the sale is illegal.³ If this principle is applicable to sales made by an officer under the authority of a judgment and execution, there seems to be still stronger reasons for extending it to sales made by officers under a special authority derived from a statute, without the intervention of judicial proceedings, and where the greatest possible degree of strictness has always been regarded as "wholesome discipline."

The North Carolina statute provided "that if no person shall bid a smaller quantity than the whole, then the whole land, so set up, shall be considered as a bid of the Governor, and the sheriff shall strike off the same to him accordingly, and execute a good and sufficient deed of conveyance to him and his successors in office." In the case of *Register v. Bryan*,⁴ the plaintiff claimed a whole tract, under a tax sale made in violation of this law, and his title was held to be absolutely void; not only as against the Governor, but also as against the former owner. The statute of

¹ Noy R. 59.

² 8 John. R. 333; 18 Ibid. 362; 1 John. C. R. 502.

³ *Isaacs v. Gearhart*, 12 B. Mon. R. 231; *Tiernan v. Wilson*, 6 John. C. R. 411.

⁴ 2 Hawkes R. 17.

Mississippi declared that the collector "shall not sell, in any one lot, more than the eighth of a section; but if one lot will not sell for the amount of the taxes due, and the costs and charges that shall have accrued, as many lots of that quantity may be sold as will be sufficient to pay the amount due, &c." In *Hodge v. Wilson*,¹ the facts were that the land sold was a quarter section, containing one hundred and sixty acres, and the collector, in offering it for sale, asked: "will any one pay the taxes, costs and charges for one-eighth, or eighty acres?" No one bidding, he then put up the whole quarter and sold it. The circuit court sustained the sale, but its judgment was reversed in the High Court of Appeals. The judges, though concurring in the reversal, did not agree upon all the points arising in the case. On this point they all agreed, viz.: "That the collector should have *designated* the particular eighth which was first offered. He cannot sell an undivided interest, and make the purchaser a tenant in common with the original owner; nor can he, by so selling, give the purchaser choice of the tract or parcel purchased. He is directed to sell in separate lots of an eighth of a section, and not an undivided interest; nor can he, by the sale, confer upon the purchaser the right to elect which specific half of the tract he will take." Chief Justice Sharkey also held that "the collector must sell in lots of an eighth of a section, and in no greater quantities. If one will not sell, another must be offered, and so on until the whole has been offered in separate lots." The opinion of Judge Thacher upon this point was, that "if the first eighth will not sell, it is to be offered with the next eighth, and so on

¹ 12 S. & M. R. 498.

until the amount of the tax is bid." And the conclusion at which Judge Clayton arrived on this question was, that "when the first part is sufficiently designated, and is not sold, then the part so offered and refused may be added to the next, and so on, until a sale is effected, or the sheriff may offer each subdivision separately." The reasoning of the Chief upon this debatable point was, that the statute "was designed to prevent the sale of more land than was actually necessary, or, in other words, to collect the taxes by the sale of as little as possible, observing the legal subdivision of sections. It is founded in the most obvious principle. Government is established for the benefit of the people, and it should not be permitted so to act, by its officers, as to produce injustice or oppression. It must protect, and not sacrifice, their rights; and all its exactions must be made with the least possible encroachment on individual rights. But for this law, the collector would have been left free to exercise his discretion; but this law prescribes a limit." In *Boisgerard v. Johnson*,¹ the principle established in *Hodge v. Wilson* was reaffirmed, and on the *debated* point, the opinion of Thacher was sustained.²

The act of Congress of May 4, 1812, for the government of Washington City, provided "that unimproved lots in the city of Washington, on which two years' taxes remain due and unpaid, or so much thereof as may be necessary to pay such taxes, may be sold, at public sale, for such taxes due thereon." In case of the *Corporation of Washington v. Pratt*,³ this question was made upon the statute: "Whether,

¹ 23 Miss. R. 122.

² See further upon this question, *Baskins v. Winston*, 24 Miss. R. 431; *Doe v. Strong*, 1 Tyler R. 191.

³ 8 Whea. R. 686.

where several lots belonged, and were assessed to one person, and two years' taxes were due on every one of them, it would be lawful to sell one of the lots to pay the taxes due upon all, or each lot would be liable only to be sold to pay the tax due on itself." To which Judge Johnson responded: "This question, thus stated, does not admit of a *general* answer. That each lot stands encumbered with no more than its own taxes, and the lien upon each is several and distinct, results, not less from the provisions of the eighth section, which gives the right of redeeming severally, than from the consideration that in case of a partial sale by the proprietor of many lots, the purchaser from him would not, by the act of transfer, hold his purchase disencumbered of its own particular taxes, either absolutely, or upon the contingency of the remaining lots of his vendor being adequate to the satisfaction of the taxes due on the whole. Nor would the purchaser of a single lot hold his purchase encumbered with the taxes due on the whole mass of lots held by the vendor: each would have the right to redeem upon paying the taxes assessed on his own particular purchase, and would hold his purchase subject to such taxes. The provisions of the act are clearly intended to raise the tax of each lot from itself; the words are, *so much* thereof, not *so many*, as they must have been after speaking of 'unimproved lots,' had it been intended to authorize the sale of some for the taxes of others; and not the sale of each one, or '*so much*' as is necessary of each one for the payment of its own taxes. Applying the enacting words to the case of an owner of a single lot, and the effect of the word '*much*' can only be to authorize a sale of part of a lot, whenever circum-

stances will admit of such a sale, and the sum due will not require more. But if taxes be due by one and the same individual, in small sums, upon many lots, and one lot being set up for sale, produces a sum adequate to the payment of all, the whole arrears become paid off, and no excuse can then exist for making further sales." The evident conclusion to which this opinion tends is, 1. That the lien upon each lot, for the taxes, is several and distinct, and a purchaser of one or more of the lots, less than the whole number, *subsequent* to the date of the assessment, from the owner in whose name they were all assessed, holds his lot or lots unencumbered with the taxes due on the other lots, the title to which remains in his vendor. 2. And where all of the lots, thus assessed to one proprietor, remain in his hands until the sale takes place, if the sale of one or more of the lots, and less than the whole number, produces enough money to satisfy the tax due upon the whole, the collector will not be justified in proceeding to sell the residue. Another statute was enacted, relating to the same city, on May 15, 1820, providing "that improved or unimproved property, or so much thereof, *not less than one lot*, as may be necessary to pay the taxes, etc., may be sold, etc.;" and still another act, passed May 26, 1824, provided "that it *shall be lawful* for the said corporation, where there shall be a number of lots assessed to the same person or persons, *to sell one or more* of such lots for the taxes and expenses *due on the whole*; and also to provide for the sale of any part of a lot, for the taxes and expenses due on said lot, or other lots assessed to the same person, as *may* appear expedient, according to such rules and regulations as the said corporation may

prescribe." In *Mason v. Fearson*,¹ which was an action of ejectment, the defendant claimed under a tax sale, purporting to have been made in pursuance of the foregoing acts of Congress. The facts were that twenty lots had been separately listed in the name of the "Washington Tontine Co." The whole were appraised at \$1,783; the tax assessed upon them was \$64,94; they were all sold separately, the entire proceeds of the sale were \$705; and the lots firstly and secondly offered brought \$85, which was more than sufficient to pay the taxes and expenses of the whole list. The court held the sale void, upon the ground that the first two lots offered having been sold for more than enough to discharge the tax due upon all, a further sale was not only *unnecessary*, but a *great sacrifice* of the property of the company, and that the law, according to the intimation in *the Corporation of Washington v. Pratt*, and the language of the act of 1824, not only *permitted* the collector to stop the sale when the bids covered the taxes and expenses due upon all of the lots, but that it was his *imperative duty to do so*. It was contended by the counsel, in support of the tax title, "that the law allowed a discretion in the city to sell each lot for the tax on each; and that in the exercise of this discretion, the sale of all can be vindicated as legal; that the intention was not to give a power which the city *must*, but which they *might* exercise; and that the owners might have saved their property by redeeming from the sale." To which the court reply: "1. That it was the design of Congress to prevent sacrifice and speculation. 2. That what a public corporation or officer is empowered to do for others, and

¹ 9 Howard U. S. R. 248.

it is beneficial to them to have done, the law holds ought to be done; the word *may*, in such cases, is imperative, and not permissive merely. 3. That the argument that the owners might have preserved their rights by redemption, is entitled to but little force, when the same *oversight, accident or misfortune* which prevented the seasonable payment of the tax, would probably defeat a redemption; and when the argument, if sound, would apply to every other defect in a tax sale; if such views were to prevail, the only remedy of the owner, against an illegal sale of his property, would be to redeem from it. But instead of such a loose constructive leniency towards a purchaser under a special law, it is well settled that where a tax title is to be made out by a party under such a law, as by the defendant in this case, it must be done in all material particulars, fully and clearly. In the language of some of the cases, it must be done 'strictly,' 'exactly,' 'with great strictness.' The *purchaser setting up a new title in hostility to the former owner, is not to be favored, and should have looked into it with care before buying, and not expect to disturb or defeat old rights of freehold, without showing a rigid compliance with all the material requisitions of the law under which the sale was made.*" Such was the reasoning of the lamented Judge Woodbury, in favor of that *rule of strictness* which has been almost universally adopted by the courts of this country in the investigation of tax titles, and it furnishes a complete refutation of the only arguments ever advanced by any court in favor of their validity, when the proceedings were manifestly irregular, viz.: that the "government must collect her revenue,"—"let the owner pay his taxes promptly, or redeem from the sale."

No one denies but that the necessities of the State demand a periodical and adequate supply of revenue ; that she possesses the power to assess it ; that it is the duty of the citizen to pay it, and that promptly ; that if he fails in the performance of this duty, the State has a right to resort to adequate coercive remedies ; that the sale and conveyance of the land of the delinquent to one who is willing to advance the tax, is a legitimate exercise of sovereign power ; that such a sale and conveyance will, if regularly made, vest an absolute title in the grantee, as complete and perfect in all respects, as a grant by the Federal government of a part of the public domain. But the great difficulty is that the State, in the exercise of her sovereign power of taxation, has always seen proper to prescribe the *mode and manner* of selling the lands of delinquents, and in such language as to make a close adherence to the terms of the power, *conditions precedent* to the validity of the sale ; at least the courts—applying to such proceedings the well-known and invariably recognized principles of the common law, which control the execution of all *special* authorities—have so held ; and the ignorance or negligence of the officers intrusted with the execution of the power, has thus far defeated the manifest design of the law. The remedy is obvious. Let the revenue laws be plain and simple—dispense with all useless and unmeaning forms and technicalities which encumber the present system. Give to the officers who execute the power, information, to enable them to perform their duties ; and when a law is once perfected, and the officers have become familiar with the routine of their duties under it, let it stand upon the statute book, and

abandon the system of annual changes in the details of the law. When these suggestions are acted upon, or some more feasible plan adopted, then will a tax title cease to be a by-word among land owners and land dealers. Then will courts no longer remark, in opening the discussion of a tax title cause, "this title is of that kind *almost proverbially known as a collector's title, as expressing a case of doubt and difficulty.*"¹ Then, no court will declare a tax title *prima facie* void, and become "*astute*" in searching for defects in them. Then liberal principles will prevail in testing their validity, and the ordinary presumptions made to sustain them. And then, and not till then, will land owners look to it at their peril that their taxes are promptly paid, or (if by oversight they suffer the day of sale to pass by) be vigilant in effecting a redemption. As things now stand, a tax title is no title at all. Out of the numerous sales made under the acts of Congress between the years 1800 and 1818, not a single one has been sustained; and not exceeding ten, under the laws of the several States, out of at least twelve hundred which have found their way to the superior courts of the country. Experience seems to have thrown but little light upon the subject, and the legislature have been unable to keep pace with the ingenuity of the bench and bar in discovering defects in tax sales.

14. Where, after an assessment is made, the county in which the proceeding was had is divided, the collector of the old county has power to sell land lying in the territory embraced in the newly created county.²

¹ 10 Mass. R. 105.

² *Devor v. McClintock*, 9 W. & S. 80.

This is in conformity with the general principles of law in analogous cases.¹

The law relative to fraudulent sales and the location of the land sold, will be examined in subsequent chapters.

¹ 5 Watts R. 87 ; 16 Ohio R. 466 ; 17 Ibid. 135-143 ; 16 Mass. R. 86 ; 4 Ibid. 389 ; 6 J. J. Marsh. R. 147 ; 4 Halstead R. 357.

CHAPTER XVI.

OF THE CERTIFICATE OF SALE.

WHEN a sale is made, the officer usually executes and delivers to the purchaser a certificate of the sale, which constitutes the evidence of the purchaser's right, and entitles him to a deed for the land sold, unless the sale is redeemed from by the owner within the time limited by law in that behalf. This is the case in Ohio, Illinois, Michigan and Missouri,¹ and perhaps in other States. In Connecticut, the statute required the collector, upon the sale of the land, "to give to the purchaser a deed of warranty thereof, to be lodged in the office of the town clerk where the land lies, to remain unrecorded twelve months; and if the owner shall within twelve months from the time of the sale, pay or tender to the purchaser, &c., the purchase money and twelve per cent. interest thereon, such deed shall be void, and shall be delivered up to the person paying or tendering the money," &c.² In other States, the officer, immediately upon the receipt of the purchase money, is authorized to execute and

¹ *Rice v. White*, 8 Ohio R. 216; *People ex. rel. Seaman v. Hammond*, 1 Doug. R. 276; *Reed v. Morton*, 9 Missouri R. 878; *Bruce v. Schuyler*, 4 Gilman R. 221; *Silliman v. Frye*, 1 Ibid. 664.

² *Ives v. Lynn*, 7 Conn. R. 505.

deliver to the purchaser a deed conveying the land to him, which vests an absolute estate in the purchaser on *condition* that the owner does not redeem the same within the time prescribed by law. In all of these cases the purchaser acquires only a *contingent* interest in the estate purchased, liable to be defeated in the event of a redemption, and if no redemption is made, an absolute and indefeasible title becomes vested in him. In the case of the *People v. Hammond*,¹ which was a proceeding by *mandamus*, the facts were that the relator purchased a parcel of land, at a tax sale held October 5, 1840, and received a certificate therefor, which, under the law, entitled him to a deed after the expiration of two years from the day of sale, unless redeemed by the owner. On the first Monday of August, 1842, before the time for redeeming from the first sale had expired, the land was again sold for taxes, and bid off by a stranger for a sum largely exceeding the taxes, interest and costs chargeable thereon, which surplus was by law required to be deposited with the State treasurer, "to the credit of the *proper owner or claimant*" of the land. The auditor general, upon this state of facts, refused, on the application of the relator, to draw a warrant on the treasurer for the surplus. The court refused to award a peremptory *mandamus*. Ransom, C. J.: "In that statute (1833) whenever mention is made of the person who buys land at a tax sale, he is denominated the *purchaser*, and no title whatever to the land sold vests in him until at the expiration of two years he receives the treasurer's deed, 'which conveyance,' says the statute, 'shall vest in the person who receives it an absolute estate in fee simple.' Prior to that conveyance he

¹ 1 Doug. R. 276.

has only a lien upon the land for the repayment of the amount of the tax paid, with twenty per cent. interest ; *he has no right to interfere with the possession of the owner ; he cannot enter upon the land for any purpose whatever, nor can he control the rents and profits.* If then, it was the conveyance by the treasurer, and not the purchase at the tax sale, which made the relator the owner of the land, he did not become such owner until October 5, 1842. Was he then, the owner in time to entitle himself to the surplus moneys which he claims ? It is perfectly clear that the individual who has the *legal* title to the land, at the time of the tax sale, is the owner entitled under the statute to the surplus moneys, if any there be."

When, however, the period allowed the owner to redeem has expired, the purchaser acquires a *vested equitable interest* in the land, which descends to his heirs upon his death, and which is placed beyond the reach of legislation. In the *Lessee of Rice v. White*,¹ which was an action of ejectment, the plaintiff claiming under a tax title, it appeared in evidence, that the sale was to William Wetmore, and that a certificate of purchase was thereupon executed, and delivered to him by the collector, in due form of law, that before the execution of the deed, Wetmore died testate, and his executors assigned the certificate to Edwin Wetmore, who assigned it to the lessor of the plaintiff, to whom a tax deed was executed. Upon this state of facts judgment was rendered for the defendant. By the court: "The certificate of purchase does not convey a legal title ; but it is evidence of an equitable title to the land, and enables the purchaser to call in the legal title. And it savors so strongly of

¹ 8 Ohio R. 216.

the realty, that, in our opinion, it descends to the heir, and is not assets in the hands of the executor. The act prescribing the duties of the county auditor, provides that such certificate shall be assignable in law, and vest in the assignee, or his *legal* representatives, all of the right and title of the original purchaser. The words 'legal representatives,' used as they are in connection with the certificate of purchase, or evidence of realty, we construe to be the *heir* to whom the realty descends. It follows, then, that the heir only could legally transfer the certificate of purchase, and, consequently, no legal title is vested in the plaintiff's lessor by the deed, which is predicated upon a void assignment." This decision is undoubtedly correct; the certificate of purchase at a tax sale, stands upon the same footing with a certificate of entry, under the laws of the United States, or a certificate of purchase, executed by the sheriff, upon a sale of land under execution; and it has uniformly been held that *they* vest in the purchaser an equitable interest in the land itself, and do not simply constitute a *chose in action*, or a chattel interest. On the death of the holder, they descend to his heirs. And the construction which the Supreme Court of Ohio place upon the words "legal representative," is in conformity with the decisions in analogous cases.¹ The right of a purchaser to a deed, in pursuance of the sale and certificate, when the time of redemption expires, is a vested one; and the legislature cannot, without a violation of the contract between the State and purchaser, repeal the authority of the officer to execute and deliver a deed

¹ *Delauny v. Burnett*, 4 Gilm. R. 454; *Grand Gulf Railroad & Banking Co. v. Bryan*, 8 S. & M. 234; 4 Missouri R. 333; 5 Ibid. 147; 9 Ibid. 714; 3 Ves. Jr. 486; 1 Yeates R. 213; 2 Ibid. 585; 2 Dall. R. 205; 6 S. & R. 83.

to him.¹ Nor can the legislature extend the time of redemption, after the rights of the purchaser have attached. Those rights attach when his bid is accepted, and he pays the purchase money, and the statute then in force constitutes the law of his contract; by it alone are his rights and duties to be determined.² The certificate vests such an interest in the purchaser, that when the time fixed for redemption has expired, and the officer improperly refuses to clothe the purchaser with the legal title, a *mandamus* will be awarded at the instance of the purchaser, to compel the execution of a deed.³ Where the law requires the purchaser to record his certificate or lodge his deed in a particular office, with the evident design of giving notice of the sale to the former owner, the requisition must be strictly complied with.⁴ In most of the States, the certificate of purchase is made assignable in law, and the officer authorized to convey, is directed to execute and deliver the deed to the assignee.

The nature and extent of the interest of one who purchases land at a tax sale, *prior to the time limited for a redemption*, presents some highly important questions, and may be appropriately considered in this connection. The general principles which control estates, granted with conditions subsequent annexed to them, are of occasional application in this class of cases. A conditional estate is one which depends for its existence upon the happening or not happening of some *uncertain* event, whereby the estate may commence, be enlarged or defeated. Such an estate may

¹ *Bruce v. Schuyler*, 4 Gilm. R. 274-8.

² *Dikeman v. Dikeman*, 11 Paige C. R. 484.

³ *Mazzy v. Clabaugh*, 1 Gilm. R. 26.

⁴ *Reed v. Morton*, 9 Missouri R. 878; *Ives v. Lynn*, 7 Conn. R. 505.

arise by implication of law, but is more commonly created by express words in the instrument by which the estate is conveyed. These conditions are either precedent or subsequent. Precedent are such as must happen or be performed before the estate can commence or be enlarged; *subsequent* are such by the non-performance or failure of which an estate already vested may be defeated. The usual practice on the making of the sale, is to deliver to the successful bidder a certificate of purchase, with a proviso attached thereto, that unless the sale is redeemed from, within the time limited by law in that behalf, the purchaser will be entitled to a deed for the land. But in several of the States, instead of this certificate, a deed is immediately executed and delivered to the purchaser, conveying to him a present estate, with a redemption clause annexed. And in all cases, the right of redemption is preserved to married women, infants, lunatics, and others laboring under special disabilities. In each of these instances the estate may be said to be granted *in præsentia*, but liable to be defeated upon a compliance with the redemption laws, by those who formerly owned the estate. If no redemption is made within the time and in the manner prescribed by the statute, the estate becomes *ipso facto* discharged of the condition; if the sale is redeemed from, the estate of the tax purchaser is defeated. Until a redemption takes place, the grantee under the tax sale (after the delivery of the deed to him,) may be regarded as the owner of the estate, at least so far as strangers are concerned. He may maintain an action at law for all injuries done to the inheritance by a wrong doer; recover in ejectment against one who intrudes himself into the possession of the estate; and, gen-

erally, do any act consistent with the nature of his title. It is presumed, however, that he cannot himself commit waste, or do any act to the injury of the estate until the time fixed for redemption has expired; and that if he attempts to do so, the former owner may restrain him by injunction. It might be prudent, however, for the complainant, in such a case, to bring into court with his bill, the amount necessary to redeem the estate. On the other hand, the tax purchaser may sustain a bill to enjoin the former owner, or those acting under his license, from the commission of similar acts of waste or destruction; this remedy he is entitled to, because a redemption is uncertain; and if it never takes place, he has a right to the estate as it was at the time of his purchase. Whether the party claiming under the tax deed, could maintain an action of trespass *quære clausum fregit* against the former owner for cutting timber upon the estate, is, to say the least, a debatable point. Until the redemption takes place, he is the owner of the estate undoubtedly. But has he all of the rights incident to an ownership in fee? Has he a right to take possession, and make improvements upon the land? If timber land, may he clear, fence, and cultivate it? These and similar questions are somewhat embarrassing. One thing, however, is certain; his possession would not be adverse to the true owner until the time of redemption expired; and consequently the statute of limitations would not run in his favor. He is in without the consent of the true owner, and against his will; but he holds the possession in subordination to the title of the original proprietor, in case a redemption is seasonably made. If the owner does not redeem, the possession may be regarded as

adverse, and having relation back to the date of his entry, even as against the former owner. But suppose a redemption takes place within the time limited, is the possessor under the tax title entitled to compensation in equity for his improvements, or is he to be regarded as having made them at his peril? Is the former owner entitled to an account of the rents and profits of the estate while in the occupancy of the tax purchaser? Has he any remedy for waste, spoil, or destruction? When the redemption takes place, can it have any retrospect, so as to make the tax purchaser a trespasser under any circumstances, or does it operate like the performance of any other condition subsequent annexed to an estate? These questions must necessarily arise in the investigation of rights acquired under the taxing power of every State; and without attempting the solution of them, or anticipating the decision of the courts when they do arise, it may be remarked that the analogy is complete between an estate at common law, with a condition subsequent attached to it, and the title of a tax purchaser after the delivery of the deed to him, and prior to the time when the right of redemption, by those laboring under disabilities, has expired; and it would seem that the same principles are applicable to each.

CHAPTER XVII.

OF CONDITIONS SUBSEQUENT TO THE SALE.

WE are not now treating of conditions subsequent, annexed to estates at common law, on the breach or non-performance of which, an estate which has *already vested*, may be defeated ; but of those acts which the law requires *to be performed after the sale has been made, in order to vest the estate in the purchaser*. In the language of Judge Cowen, these conditions, "if looked to in their chronological order, are indeed conditions *subsequent* ; but for the purpose of giving effect to the deed, they are conditions *precedent*, to all intents and purposes, and without shewing affirmatively the literal performance of them, the deed is mere *waste paper*."¹ The statutes of several of the States require either that the ministerial officers of the law, or the purchaser, shall within a limited time after the sale has taken place, perform certain duties or acts intended for the protection of the former owner, the non-performance of which invalidates the sale. The duties of this character most commonly enjoined upon the officers, are the return of the proceedings anterior to, and at the time of the sale, and the

¹ *Bush v. Davidson*, 16 Wend. R. 554.

deposit or record of the same; and those imposed upon the purchaser are the filing of a surplus bond, the record of his certificate of purchase, and the giving of a notice to redeem, *actual* or *constructive*, to the former owner. Of each of these in their order.

Where the law requires the officer who made the sale, to return a history of his proceedings, it must be done at the time and in the manner prescribed, or the sale is invalid. The return must show the description of the land, the name of the purchaser, the time of the sale, and all other particulars connected with it which the law requires. The object of this legislation is to perpetuate the facts attending the transaction, to enable the owner to learn from the record the fact that his land has been sold, and to guide the officer intrusted with the power, in the execution and delivery of a conveyance to the purchaser. It is neither safe nor expedient to leave the title to real estate to depend, in any case, "upon the uncertain and fading memory of mortal man;" and it is not the policy of the law to do so. By the return, the owner is always enabled, by going to the proper officer, to ascertain with certainty the fact of sale, and protect his interest in the premises by a redemption, or at his peril contest the validity of the proceedings. And the officer entrusted with the power of making the conveyance, is enabled to ascertain the description of the land, the amount of the bid, the quantity sold, the name of the purchaser, and every other fact which the law requires to be stated in the deed. The return of sale, in this class of cases, is not analogous to the return upon an execution, and stands upon an entirely different footing. There the authority of the officer is derived from the judgment

and execution, and no neglect in advertising, no irregularity in the sale, or subsequent proceedings, can defeat the title of the purchaser. The officer may justify, and the purchaser acquire a title under an execution, although it is never returned. If the power once existed, it is immaterial what becomes of the evidence of it. Such are the principles which govern the sales of sheriffs under executions.¹ It is very different as regards the returns of collectors, under the revenue laws. There are no parties to the proceeding but the State, officer and purchaser. The owner is neither a party nor privy. The proceeding is against his will, in hostility to his rights, and for the purpose of subverting his title. The officer is not his agent, and has no power to bind him, except so far as he pursues the imperative provisions of the law. The officer acts at his peril in selling and making his return, and the owner in determining whether he will redeem, or contest the title of the purchaser, as shown by the return. The return is essential to enable the owner to determine upon his course of action, and as it is beneficial to him that a return should be made, *that return* becomes an important prerequisite, and unless it is made within the time, and in the mode prescribed by law, no title can pass to the purchaser at the sale. Besides, the proceeding is *stricti juris*, and upon general principles, the law gives an action against the officer for making a false return, and unless that return is made, the owner is remediless in the premises. Again, there are no other means provided for giving to the owner official information of the fact of sale, and the

¹ 4 Whea. R. 500; 2 Binney R. 401; 1 Cowper R. 18; 10 East R. 73; 8 John. R. 52.

particulars connected with it, except in those States where a register of the sale is made and kept by the officer in whom the power of sale is vested, or by his legal assistant. Thus, the Illinois statute of February 27, 1833, requires the sale to be made at the time and place designated, by the clerk of the county commissioners' court, assisted by the sheriff, as auctioneer, and directs the clerk to "keep a register of such sales, in a book to be provided by him for that purpose, in which he shall enter each tract of land exposed to sale by the sheriff, as particularly as described in the advertisement, &c., stating the precise quantity of each tract sold, to whom sold, and the amount of the proceeds of such sale, leaving at the end of each line three columns in blank, of sufficient space to insert the names of persons who may redeem such land, the date of redemption, and the amount of the redemption money,"¹ and transmit to the auditor of State a transcript of the same.² And under the act of February 26, 1839, where the sale is made by the sheriff, aided by the clerk, similar duties are imposed upon the latter relative to the keeping of a registry and the making of a return of the sale.³ It is evident that the registry and return are of importance to the former owner and purchaser, and also to the officer who executes the deed, and through whom a redemption is effected. By reference to the register, the owner can be informed as to the time when the sale was made, the amount for which the land sold, who made the sale, when and where it was made, the quantity of his land sold, and every other fact necessary to enable him to

¹ Laws 1833 p. 530, Sec. 6.

² Ibid. Sec. 7.

³ Laws 1838-9 p. 15, Sec. 36.

redeem or contest the regularity of the proceedings. On inspection, the purchaser can see whether the sale has been redeemed from, when and by whom it was effected, and the amount of the redemption money paid to the officer; thus ascertaining the legality of the transaction, and the extent of the officer's liability to him. The registry, or return, is also the guide of the officer, when he executes his deed, or the owner applies to redeem, and when the purchaser calls upon him for payment of the redemption money. And under these statutes, the transcript of the sale, directed to be returned to the auditor, was evidently intended for the benefit of non-resident owners, by giving to them additional means of informing themselves of the fact of sale, and the particulars of it. In every view of the subject, it is manifest that the return, or a registry of the sale, is beneficial to all parties in interest, and therefore becomes a substantial prerequisite to the validity of the purchaser's title. The statute of Maine required the collector to make return of "his particular doings in the sale," to the town treasurer, within thirty days after the sale. Under this statute it has been held, that unless the return is made within the *time* limited, the title of the purchaser cannot be sustained.¹ In this case the return did not designate the land sold, and the court held that even if made within the time prescribed, it was void, for want of a specification of the land; "the owner could not ascertain from it whether any, or what land of his had been sold." Under the statute of New Hampshire, it was held that the return must show that the sale was made to the highest bidder.²

¹ *Andreas v. Senter*, 32 Maine R. 394.

² *Ante*, p. 325.

The Maine statute made it the duty of the collector "to return to the town clerk his particular doings in the sale of unimproved lands of non-resident proprietors, within thirty days after the day of sale." In *Shimin v. Inman*,¹ the return was in this manner:

"HOWLAND, February 6, 1836.

Charles Davis bought of Daniel Wood, collector, lots of land as follows, viz.:

Watercourse.	No. of the Lots.	Range.	No. Acres.	Taxes and Charges.
On Penobscot River	16, 17, 18.	—	220	\$6.53

Howland, February 10, 1836.

DANIEL WOOD,

Collector of Howland for the year 1835."

This return was held void because the description of the land was indefinite. By the court: "The soundness of the argument cannot be admitted, that the neglect of the collector to do a subsequent act should not prejudice the title of the purchaser. For his title is made to depend upon proof of a compliance, by the collector, with the requisitions of law."²

¹ 26 Maine R. 228.

² The only authority opposed to the doctrine of the text is that of *Hollister v. Bennett* (9 Ohio R. 83). The statute of Ohio provided that after making the sale, the collector should, on or before the first Monday in January then next following, transmit to the auditor of the county "a list of all lots or parts thereof sold, also the purchaser's name, etc." A further provision was that the collector should give a certificate of sale, "and at any time thereafter, make a deed to the purchaser." The sale and deed were made on the same day. There was no evidence as to whether a return was or was not made. By the court: "Whether this return was made in the present case, we know not, as there is no evidence upon the point. It is not necessary, however, that it should be done immediately after the sale. If it be made on the first Monday of January next succeeding, it is sufficient. Before this time a certificate of purchase must have been issued, and it may be that a deed has been executed. In fact, in the case before the court, the deed was executed on the 19th day of December, the very day of sale, which, if the proceedings hitherto had been in conformity with law, vested a title in the grantee, and it would be rather extraordinary to hold that the title could be divested by the failure of the collector to do an act which he was subsequently bound to perform."

The Connecticut statute required the collector "to give to the purchaser a deed of warranty thereof, to be lodged in the office of the town clerk, where the land lies, there to remain unrecorded twelve months; and if the owner shall, within twelve months from the time of sale, pay or tender to the purchaser, etc., the purchase money and twelve per cent. interest, such deed shall be void, and shall be delivered up to the person paying or tendering the money, etc." In *Ives v. Lynn*,¹ the land was sold July 29, 1822, and the deed was not executed until April 1, 1826. The proceedings were held void. By the court: "In order to carry the whole law into effect, the deed must be executed with all convenient speed after the sale, and lodged with the town clerk, otherwise the right of redemption cannot, or at least may not, be exercised, for deficiency of notice. Neither the owner of the land, nor a purchaser, mortgagee, or creditor, is bound to look anywhere but at the town clerk's office, to get the requisite information of the facts, in order to decide on the necessity or propriety of redeeming the estate sold. The deed in question was not executed until nearly four years after the sale of the land by the collector. The validity of the deed depending in positive law not complied with, it is undoubtedly void."

The statute of Vermont provided that "every collector shall, within thirty days after completing the sale, etc., cause his proceedings to be recorded in the proper office for the recording of deeds." Where there was a failure on the part of the collector to perform this duty, the sale was held void.² So where

¹ 7 Conn. R. 505.

² *Richardson v. Dorr*, 5 Vermont R. 9; *Giddings v. Smith*, 15 Ibid. 357.

the sale was completed July 31, 1799, and the proceedings were not lodged until March 4, 1800.¹ The same doctrine was reaffirmed in *Taylor v. French*,² where the facts were that all of the lands upon the list were sold August 24, 1829, but for some reason not shown, the sale was adjourned until October 5, 1829. No sales were made on the latter day, but the collector, finding that all of the sales had been made, and no mistake being discovered, he adjourned the vendue without day, and on the 16th day of October made his return of the proceedings. The proceedings were held void because the return was not made within thirty days *after the completion of the sale*. By the court: "It is said that the collector had power to adjourn the vendue, and that therefore the thirty days should commence running from the time it was adjourned without day. Vendue sales for land taxes are proceedings *in invitum*, and we have always required a strict compliance with the statute requisites. The statute is that the return shall be made within thirty days after completing the sales. To hold that this means thirty days from the time the collector shall see fit to adjourn the vendue, without day, though the sales may have been completed long before, is a perversion of language. The statute can have but one meaning. The time must commence running when the sales are all completed; and it matters not when the vendue shall in form be finally dissolved. The time begins to run when the sale is ended."

In *Sumner v. Sherman*,³ the law required the collector to keep a record of his proceedings, and within thirty

¹ *Mead v. Mallet*, 1 D. Chipman R. 239.

² 19 Vermont R. 49.

³ 13 Vermont R. 609.

days next after the ending of his vendue, lodge a true and attested copy of his sales, together with his warrant, tax bill and advertisement, with the town clerk, whose duty it was made to record the same. The collector failed to perform this duty, and the tax sale was held void. Williams, C. J.: "This was calculated to protect the purchaser, as well as the owners, whose lands were sold, by preserving the evidence of the proceedings and the authority of the collector, and by preventing any fraud to be apprehended from the mutilating or falsifying of these records by the collector, or deeding when he had not sold, or when he had no authority to sell. By a resort to these records, the purchaser could ascertain whether his title was complete, and the owner whether his title had been divested by a public sale. It may be sufficient for us to say that the legislature have required this to be done, and that by all the previous decisions in this State, it has been considered that a failure to do so was fatal to the purchaser's title; that, although the purchaser has no control over the collector to compel him to leave this copy, or over the clerk to compel him to record it, yet unless it is done, he can acquire no title, and if he has any remedy, it is against the officer who neglects his duty. It has never been doubted that a failure to comply with what is enacted, must be fatal to any title attempted to be acquired. Thus, it has been considered that a neglect of the collector to record his proceedings, to leave a copy of his warrant and advertisement, although subsequent to the sale, or to take the oath of office, and give bonds when required to do so, was a defect which prevented any title from passing by his sale."

Where the proceedings were required to be recorded

“in the proper office for recording of deeds,” and they were recorded in separate books, provided for the special purpose, and not in the regular books of the office, this was held to be a compliance with the law.¹

For the purpose of perpetuating the authority of the officer to sell, and the regularity of his proceedings, the legislature in some of the States have required such proceedings, or some portion of them, to be recorded at length in a particular public office. When the duty thus enjoined has been entirely neglected, imperfectly performed, or not performed in the time required by the statute, the title derived under such proceedings has been held void. The statute of Vermont directed the town clerk to record the collector's advertisement, and certify whether the same had been published according to law. In *Judevine v. Jackson*,² this requirement not having been complied with, the tax sale was held illegal. The reasons of the court are thus assigned: “Purchasers and land owners are to look to the records to ascertain whether a vendue is correct and valid, and whether it is necessary for the owner to redeem. The records must contain full and plenary evidence in this particular. Hence it is obvious, that if the certificate of the town clerk, as to the publication of the advertisement, is omitted, there is no legal evidence that the advertisement has been published as required by law. The purchaser may find he has no title; and the owner may omit to redeem, inasmuch as his land has not been legally sold.”

In regard to the *manner* in which the record is to be made up by the officer, upon whom the duty is devolved, the courts are inflexible in requiring a rigid

¹ *Isaacs v. Shattuck*, 12 Vermont R. 668.

² 18 Vermont R. 470.

compliance with the requirements of the statute. The legislature of Vermont required the collector, on the completion of his sale, to make a return of his proceedings for record in the proper office for recording deeds in his township; and the town clerk was directed to record the advertisements at length, together with the title, number, volume and date of the newspaper in which they were inserted, *and the place where such papers were printed*. In *Culver v. Hayden*,¹ the place of the publication of *one* of the newspapers did not appear in the record made by the town clerk, and the sale was defeated for this omission. Turner, J., said: "That the clerk should have made the statement of the place where the paper was printed, a part of the record, is a positive requirement of the statute, and a compliance with this requisition must be regarded as a *condition precedent* to the conveyance of a good title by the vendue deed. Where property is affected, or the title to it divested, by the provisions of a special act of the legislature, the requirements of the act must be *strictly* followed. In the present case, the operation of the special statute was to divest the defendant of his property, on his failure to perform a duty created by the statute, and on the performance of certain acts prescribed to the officers required to collect the tax and record the proceedings. The performance of these acts is the *condition* on which the property was divested; and it is not for the court to inquire whether the provisions of the statute were reasonable, whether a compliance with them might be dispensed with without injury to the defendant, but whether they have been made; and if so, they must be *literally* pursued." In another

¹ 1 Vermont R. 359; reaffirmed in *Clark v. Tucker*, 6 Vermont R. 43.

case the record omitted the date of the newspaper and its place of publication, and the sale was held void, the court remarking: "These records are not evidence unless they contain *all the requisites* pointed out by the statute. The statute is very particular in describing what shall be recorded, and makes certified copies of the record, evidence. Those which *fall short* of this description are not evidence."¹ Another record omitted the *official* signature of the collector to the advertisement, which was attempted to be recorded at length, and for this defect, the tax title was avoided.² In another case, the offices of collector and town clerk were held by the same person — Jonas Stone — and in certifying upon the books of the town clerk the verity of the record, he signed his name thus, "Jonas Stone, Collector," and the tax sale was declared illegal for this wrong designation.³ In another case, the record of the advertisements was in the exact form prescribed by law, but the clerk made his record from *copies furnished him from the collector's books*, instead of from the newspapers themselves, which the collector was required to lodge with him. The tax sale was defeated. The court say: "Is this a compliance with the statute? It is a principle of the common law that a copy of a certified copy of a record is not evidence. The reason is, that the more removed the copy offered in evidence is from the original, the greater is the liability to inaccuracy. The objection would not be obviated though each copy be examined and compared by the same individual. In the present case the record is two removes

¹ *Coit v. Wells*, 2 Vermont R. 318.

² *Spear v. Ditty*, 9 Vermont R. 282.

³ *Isaacs v. Shattuck*, 12 Vermont R. 668.

from the original advertisements. The statute requires the clerk to record the advertisements themselves. This is imperative."¹ It may be remarked that in this case, the town clerk was held a competent witness to prove the facts upon which the objection was founded. In another case, the court held that the record must be verified by the official signature of the clerk.² The principles illustrated by these cases are fully sustained by the authorities.

Although the courts are thus strict, in requiring a compliance with every requirement of the statute relating to the record of the proceedings, yet intentions are occasionally indulged in for the purpose of sustaining the validity of the record. It is generally said that no presumptions are indulged in favor of tax titles. "It is true that no *essential, requisite* will be presumed; but to a certain extent presumptions may, and must be made; otherwise we are driven to forced and violent presumptions the other way, which are not to be made."³ It was objected in one case, that the place of publication did not certainly appear in the record. The law required the record to state "the place where such paper was printed." The record showed that the advertisement was "published *at Windsor*." There was a town and county in Vermont of that name. It was insisted that the phrase "at Windsor" was equivocal, but the court held otherwise. "We say *at* a town or village, but *in* a county or State. From this record no sober or sane man could seriously doubt where this paper was printed. And while we intend to be *strict* in regard to titles claimed by virtue of collectors' sales of land for taxes, and to

¹ *Carpenter v. Sawyer*, 17 Vermont R. 121.

² *Taylor v. French*, 19 Vermont R. 49.

³ *Spear v. Ditty*, 8 Vermont R. 419.

dispense with no prerequisite which the statute fairly indicates, we hope to escape the imputation of frivolous and puerile criticism."¹ Another objection taken to the record in this case, and overruled, was that the law required the advertisement to be published in three different newspapers, and recorded at length, whereas in this case, the clerk had copied one, and referred to the others by name, date, number, volume, and place of publication, certifying that they were in the same form as the one recorded. And, lastly, it was objected that the proceeding was recorded in a separate book, kept by the clerk for the record of tax proceedings, whereas the law required the proceedings to be recorded "in the proper office for recording of deeds," which seemed to imply that they should be recorded in the record books containing deeds. But the court held the record valid. In *Bellows v. Elliott*,² it appeared from the record that the three newspapers in which the collector's advertisement appeared, were published at Danville, Rutland and Windsor, but the State was not named, and the court presumed that these towns were in Vermont.

Such is the nature of the duties imposed upon the *officers*, which occur chronologically after the making of the sale, and such the decisions of the courts in reference to the effect of the non-performance of them, with the exception of the *filing* of the surplus bond, under the Pennsylvania system, which will be noticed presently. It is now proposed to state the cases arising under those statutes where a duty is imposed upon the purchaser himself, in order to perfect and protect his title, after his purchase is consummated.

¹ *Isaacs v. Shattuck*, 12 Vermont R. 668.

² 12 Vermont R. 569.

The statute of Missouri authorized the officer making the sale, to execute and deliver to the purchaser a certificate of the sale, and required the purchaser to cause it to be recorded, and if the sale was not redeemed from within two years, the officer was then directed to deliver a deed to the purchaser, &c. In *Reed v. Morton*,¹ the facts were, that the sale took place June 18, 1832, the certificate bore date June 20, 1832, but was not recorded until January 13, 1836, and the deed was executed and recorded June 28, 1834. The sale was held void. Scott, J.: "If the certificate was not recorded before the execution of the deed, it could hardly have been of any avail to record it afterwards. The recording of the deed answered all the purposes designed by a record of the certificate. Here then is a material act to be done by the purchaser, which he has failed to do. The owner of the land had two years, within which he might have redeemed. Had the certificate of sale been *seasonably* placed on the record of deeds, might not some one have seen it, and communicated the fact to the owner? Might not some rumor, by that means have been spread abroad, which would have reached his ears? But the party has withheld this instrument from record, when he was required by law to place it there, and we can see that the owner of the land *may* have sustained an injury in consequence of this neglect. But according to the principles above asserted, (relative to the strictness required in this class of cases,) *we do not feel called upon to give reasons why this thing should have been done.* He who wishes to obtain an estate worth thousands, for less than ten dollars, and under and by virtue of

¹ 9 Missouri R. 878.

the law, is not to be permitted to ask why he should be required to do this or to do that. It is an answer, that it is required by law. *Ita lex scripta est.* He claims by the law, then by that law let his pretensions be judged. But this provision was designed as one of the means of communicating to the owner the fact that his land has been sold. The placing of it on record after the time for redemption expired, was a nugatory act; it should have been seasonably recorded, and the failure to do so renders it void, and by consequence, the auditor's deed."

The statutes of Pennsylvania authorized a sale of unseated land to the highest bidder, and required the purchaser to pay the amount of the taxes and costs due upon the land to the treasurer, (the officer empowered to make the sale,) and execute and deliver to that officer a bond for the payment of the surplus, if any, to the owner of the land. The statute is not at hand, and on account of the mode of reporting the cases which have arisen under these statutes, it is impossible to state with accuracy the precise terms of the law. The substance of them, however, seems to be that the treasurer shall prepare the bond, that the purchaser shall execute it, and the treasurer file the same forthwith in the office of the prothonotary; and the bond is declared to be a lien upon the land purchased, in favor of the former owner, for the period of five years from its execution; and it is presumed, from the language of the courts, and the nature and object of the requirement, that the bond ought to be executed simultaneously with the consummation of the sale—that the execution and delivery of the deed and bond are concurrent acts. The following adjudications have been made in that State in the construction of these statutes:

1. That the execution and delivery of this bond by the purchaser to the treasurer, is a condition precedent to the validity of the title acquired at the tax sale. Upon this point Chief Justice Gibson remarks:¹ "The bond for the surplus purchase money, beyond the amount of the taxes and costs, was not given by the purchaser until two years after the execution of the deed. This is fatal. The legislature intended to make the filing of the bond and the delivery of the deed concomitant acts; for it is expressly declared that the bond is to be filed '*forthwith*.' But the reason of the thing is sufficient to show what was meant. In the case of an ordinary purchase, the party calling for the execution of the contract, must, in the absence of a positive stipulation, have performed, or at least, be ready to perform everything he was bound to do; and the same principle is applicable to cases of purchase at tax sales. The purchaser is not to be invested with title to perhaps a valuable tract of land, and on payment of a few cents, before that portion of the purchase money which belongs to the original owner, has been secured in the way pointed out in the law. It is no answer to say it is the duty of the officer who executes the deed, to see that the bond be filed, and that for negligence in that particular, the owner has a remedy against him and his sureties; and that, as the owner is secured in this shape, the title passes independently of the bond. For whose security is the bond to be filed? Certainly for that of the owner. The intention was to give him a lien upon the land itself, and to make it the duty of the purchaser, at the peril of his title, to see that he has it. He might otherwise encumber the land so as to

¹ *Sutton v. Nelson*, 10 S. & R. 238.

render a bond subsequently given, no security at all. Besides, it would be unreasonable, and what the legislature never intended, to suffer bidders to turn the sale into a mere experiment, and to hold to the contract or rescind it, as the bargain should turn out to be a good or a bad one; or, as in this very case, to execute the bond after the lapse of a considerable period, and to claim the land after the original owner had enhanced its value by improvements. The law intended that every transaction of this kind should be a real one, the execution of the bond and deed being simultaneous, whereas when the officer parts with the deed, without having obtained the bond, the purchaser is to be considered as obtaining it surreptitiously, because the officer transcends his power, and under such circumstances the delivery is void." And in *McDonald v. Maus*,¹ which was an action of ejectment, the plaintiff gave in evidence a legal and regular title in himself, and the defendant relied upon a tax title. It was objected to the latter title, that the defendant had given no bond to the treasurer for the surplus of the purchase money. There was no positive evidence whether such a bond was given or not. But the court below being of opinion that, whether there was proof of it or not, the defendant's title was good, so instructed the jury, who found a verdict accordingly, upon which judgment was entered. The judgment was reversed by the supreme court, and a *venire de novo* awarded. Rogers, J.: "If a purchaser, at a treasurer's sale for taxes, has neglected to file a bond, for the surplus moneys, within two years after the sale, the deed to him is void."² Although subsequent cases have somewhat limited this

¹ 8 Watts R. 364.² *Sutton v. Nelson*, 10 S. & R. 238.

rule, so far as it regards the person whose duty it is to *file* the bond, yet the execution and delivery of the bond forms a part of the title, and whenever a person relies upon a tax title, it is necessary for him to prove affirmatively the filing of the bond, or at any rate its execution and delivery. Without this, the title is void, and cannot avail against the former owner." This doctrine was reasserted in *Donnell v. Bellas*.¹

The payment of the whole amount of the purchase money to the treasurer, cannot be taken as a substitute for the surplus bond. The bond is a lien on the land, for which the personal security of the treasurer is not an equivalent. Even his sureties would be irresponsible for the surplus thus placed in his hands, for the receipt of it would certainly be an unofficial act.² In *White v. Willard*,³ the purchaser gave bond at the time of the sale, as required by law, but the bond was mislaid, by the treasurer, and was not found until seven years after, when it was filed in the proper office. It was held by the court, that the title of the purchaser became perfected, when he executed and delivered to the treasurer the surplus bond contemplated by the statute, and that the neglect of the treasurer to file it, could not affect the title of the purchaser. By the court: "It is not the business of the purchaser to attend to the duty of the officer, further than to see that he had the bond; nor can he be made answerable for negligence not his own. For whose benefit is it that the officers perform this particular duty? Certainly for the benefit of the former owner, who alone has remedy against him for a breach of it; and this shows

¹ 10 Pa. State R. 341.

² *Connelly v. Nedrow*, 6 Watts R. 451.

³ 1 Watts R. 42.

that the purchaser is not the party to suffer by the officer's negligence. If, then, the purchaser has performed his part by delivering the bond, he is not chargeable with negligence in remaining ignorant of the officer's omission, for seven or any other number of years. But, granting him to have been aware of the fact, yet not being a trustee for any one, it was not his business to interfere, which is still more conclusively shown by his total inability to control the officer's actions." The same principle has been affirmed in other cases.¹

2. To prove the execution and delivery of a surplus bond, rests with the purchaser. And he must show, by satisfactory proof, that the law, in this respect, has been strictly complied with. Where diligent search has been made in the proper office, for the bond, and it cannot be found, and the testimony of the treasurer, or a third person, is relied upon, to establish the fact that a bond was executed and delivered, by the purchaser, the evidence must be clear and satisfactory in its character, and not depend upon the indistinct recollection, the vague impression or doubtful surmise of the witness.²

3. The receipt of the treasurer, for the surplus bond, required of the purchaser by the act of Assembly, is *prima facie* evidence of the execution and delivery of the bond by the purchaser, and of the fact that it was duly filed by the treasurer;³ and, in the absence of any rebutting proof, must, like all *prima facie* evidence, be deemed *conclusive*.⁴ So a *recital* in the tax

¹ *Burns v. Lyon*, 4 Watts R. 363.

² *M'Donald v. Maus*, 8 Watts R. 364.

³ *Fager v. Campbell*, 5 Watts R. 287.

⁴ *Robinson v. Williams*, 6 Watts R. 281.

deed, of the execution of a surplus bond, is held to be *prima facie* evidence of that fact.¹

4. The bond must contain a specification or particular description of the land sold, otherwise it is vicious, and the title of the purchaser defective. The reason is, that the statute makes the bond a lien for the surplus, upon the land purchased, and surely the bond cannot create a specific lien against rights subsequently acquired, unless the land upon which it was intended to operate is specifically described in it; and the indorsement of the description, by the treasurer, upon the back of the bond, cannot aid it, as the officer's indorsement is no part of the instrument. The indorsement is a simple memorandum for the convenience of filing it. The omission to describe the land in the bond, is not simply a misprision of the treasurer. It is true that the treasurer is charged with the business of preparing it, but he is bound to perform it under the direction of the purchaser; and the latter is bound on the other hand, *to know the law of his title*, and to point out errors in the concoction of it. When the bond is delivered, his participation ends, and the exclusive business of the treasurer begins. Previous to the execution and delivery of the bond, the purchaser acts at the peril of his title.²

5. A trifling variance between the surplus and the bond will not defeat the title of the purchaser. It is a mere misprision of the officer, and being immaterial, the maxim "*de minimus non curat lex*," applies. It is presumed that it is not necessary to give a surplus bond when the surplus does not exceed the cost of its execution.³

¹ *Divinney v. Reynolds*, 1 W. & S. 328.

² *Bartholomew v. Leech*, 7 Watts R. 472.

³ *Frick v. Sterrett*, 4 W. & S. 269; *Divinney v. Reynolds*, 1 W. & S. 328.

6. The purchaser, in order to show that his bond covered the amount of the surplus, may contradict the recital in the treasurer's deed, as to the amount of the surplus, by the sale-book or other competent evidence.¹

7. In *Burns v. Lyon*,² it was held that common law proof of the execution of the surplus bond was unnecessary, that its execution would be presumed, from the fact that it was found among the files of the prothonotary's office.

8. Secondary evidence of the existence and contents of a surplus bond, is not admissible until its loss or destruction has been established, in conformity with the principles of the common law.³

The constitution of Illinois⁴ contains the following provision: "Hereafter, no purchaser of any land or town lot, at any sale of lands or town lots for taxes due either to this State, or any county or incorporated town or city within the same, or at any sale for taxes or levies authorized by the laws of this State, shall be entitled to a deed for the land or town lot so purchased, until he or she shall have complied with the following conditions, to wit: such purchaser shall serve, or cause to be served, a written notice of such purchase, on every person in possession of such land or town lot, three months before the expiration of the time of redemption on such sale, in which notice he shall state when he purchased the land or town lot, the description of the land or lot he has purchased, and when the time of redemption will expire. In like manner, he shall serve on the person or persons

¹ *Turner v. Waterson*, 4 W. & S. 171.

³ *Driesbach v. Berger*, 6 W. & S. 564.

² 4 Watts R. 363.

⁴ Art. IX., Sec. 4.

in whose name or names such land or lot is taxed, a similar written notice, if such person or persons shall reside in the county where such land or lot shall be situated; and in the event that the person or persons in whose name or names the land or lot is taxed do not reside in the county, such purchaser shall publish such notice in some newspaper printed in such county; and if no newspaper is printed in the county, then in the nearest newspaper that is published in this State to the county in which such lot or land is situated; which notice shall be inserted three times, the last time not less than three months before the time of redemption shall expire. Every such purchaser, by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of having complied with the conditions of this section, stating particularly the facts relied on as such compliance; which affidavit shall be delivered to the person authorized by law to execute such tax deed, and which shall by him be filed with the officer having custody of the records of lands and lots sold for taxes and entries of redemption in the county where such land or lot shall lie, to be by such officer entered on the records of his office, and carefully preserved among the files of his office; and which record or affidavit shall be *prima facie* evidence that such notice has been given. Any person swearing falsely in such affidavit shall be deemed guilty of perjury, and punished accordingly. In case any person shall be compelled under this section to publish a notice in a newspaper, then, before any person who may have a right to redeem such land or lot from such tax sale, shall be permitted to redeem, he or she shall pay the officer or person who by law is authorized to receive such redemption

money, the printer's fee for publishing such notice, and the expense of swearing or affirming to the affidavit, and filing the same."

This is the first instance where the people in the exercise of their inherent sovereignty have undertaken to *legislate* upon the subject of tax titles. It will be perceived by a careful analysis of this section, that it provides — 1. That it shall extend to all tax sales made under the authority of the State, and of counties and municipal corporations. 2. That the purchaser in order to entitle himself to a deed, must give a *written* notice of his purchase, to every person in possession of the land. 3. That he shall serve a similar notice upon the person in whose name the land was listed for taxation, if such person resides in the county where the land lies. 4. That if the person in whose name the land is listed does not reside in such county, then the purchaser is required to publish the notice in a newspaper printed in that county. 5. If no newspaper is printed in the county, then the notice is to be inserted in the *nearest newspaper* published in the State, to the county in which the land is situated. 6. That the actual notice to the occupant or person in whose name the land was listed, must be served at least three months before the expiration of the time of redemption. 7. That the newspaper publication must be inserted three times. 8. That the last insertion in the newspaper shall be at least three months prior to the time when the redemption expires. 9. That the notice, whether *actual* or *constructive*, must contain a statement of the time of the sale, a description of the land, and the time when the redemption will expire. 10. That the purchaser in person, or by his agent, must make affidavit of a com-

pliance with these requirements. 11. That such affidavit must state particularly the facts relied upon as evidence of such compliance. 12. That the affidavit thus required shall be delivered to the person authorized by law to execute the tax deed. 13. That the deeding officer shall file it with the officer having the custody of the records relating to tax sales and redemptions. 14. That the latter named officer shall *enter the affidavit upon the records of his office*, AND shall carefully preserve the same among the *files* of his office. 15. That the affidavit, when made in compliance with the requisitions of the constitution, shall be deemed *prima facie* evidence that the redemption notice has been duly given. 16. That perjury may be assigned upon a false affidavit made under this section. And, LASTLY, When the owner, occupant or other person in interest, applies to redeem, he or she must pay the expenses attending the publication of the notice and the proof of the same.

But few questions arising under this constitution have, as yet, been litigated in Illinois. This organic law became operative on the first day of April, 1848. Some tax sales were made after that period, upon assessments made during the preceding fiscal year, and the question arose upon a *mandamus* to compel the officer to make a deed to a purchaser, who had failed to comply with the foregoing provisions, whether the constitution embraced such a case. It was insisted by the counsel for the tax purchaser, that the constitution did not apply to tax proceedings *in fieri* at the time it went into effect, but only to subsequent assessments and sales. On the other hand, it was contended that the constitution related only to *sales* and redemptions under the revenue laws, and that *its words and spirit*

required the notice of the sale to be given, in all instances where a sale took place *after the constitution went into operation, whether based upon a prior or subsequent assessment*; that the purchaser acquired no vested interest in the tax proceedings until his purchase, which was after the constitution became operative; and as he purchased with full notice of this requirement, he was bound to conform to it; that the only interest which he could possibly have in the proceedings anterior to the sale, was in the maintenance of them according to the law in force at the time they respectively took place, freed from the legislative power of repeal by which a right acquired by him, at a sale founded on those proceedings, might become divested; that the doctrine of *relation* could have no other effect than to shield him from legislative spoliation, and protect him against rights acquired by third persons in the land purchased intermediate the assessment and sale. The *mandamus* was refused, and an appeal taken, but never prosecuted, so that the question has not yet been decided by the highest court of resort. It would seem, however, upon principle, the literal construction of the constitution itself, the spirit of the requirement and analogous cases, that notice to the occupant and person, in whose name the land was listed for taxation, should have been given by the purchasers, at all sales made throughout the State, *after* the adoption of the constitution, although founded upon assessments for the preceding year. The question assumes great importance, inasmuch as it affects most of the sales in Illinois during the year 1848. To the argument already advanced, it may be added that the same objection which may be urged against the retrospect-

ive operation of an ordinary law, cannot be urged against a similar operation of a constitution which is the fundamental and supreme law of the land—ordained by the people themselves, who acknowledge no superior in a legal sense—especially as the provision in question does not interfere with the vested rights of any individual.

In *Weer v. Hahn*,¹ the question came up as to the meaning of the expression, "*nearest newspaper*," as used in the constitution. The action was ejectment, in which the defendant claimed under a tax title upon a sale made in 1850 for the taxes of 1849. The land was situated in the county of Macoupin, the redemption notice was published in a newspaper called the "*Green County Banner*," a paper published in the town of Carollton, the county seat of an adjoining county; there was no newspaper then published in the county where the land lay; it was proved upon the trial, that at the time of the publication of the several redemption notices, newspapers were regularly published in Hillsboro, Jerseyville, Edwardsville and Alton, towns situated in adjoining counties, each of which were nearer to the boundary line of Macoupin than Carollton. Alton was seven miles nearer. The court held the notice insufficient. Chief Justice Treat, after reciting the foregoing section of the constitution, proceeds to say: "These constitutional provisions are clearly designed for the benefit of the owner of real estate. The principle is that he shall not be divested of his title by a sale for taxes, unless he has, when practicable, personal notice of the sale, and of the time when his right to redeem will expire. To secure this object, the purchaser is required to

¹ 15 Illinois R. 298.

serve a written notice of those facts on every person in possession of the land, and on the party in whose name it was listed for taxation, at least three months before the time of redemption will expire. If the latter is not a resident of the county, a similar notice must be published in a newspaper of the county; and if there is no newspaper within the county, the notice must be published in the nearest newspaper to the county. These requirements, being intended for the protection of the owner, must be strictly complied with in order to divest him of his title. They are imperative, and cannot be disregarded. The purchaser is not entitled to a deed until these precedent conditions are strictly performed; and if he succeeds in obtaining a deed without such performance, the title of the owner will not thereby be defeated. In this case the plaintiff, in whose name the land was assessed, did not reside in the county, and no newspaper was published therein. It was, therefore, incumbent on the defendant to give notice in the 'nearest newspaper published in this State to the county.' The question is, has he complied with this requisition? It is clear that the answer must be in the negative. The notice is to be published in the nearest newspaper to the county. That is a matter of fact which is easily ascertained. A newspaper of an adjoining county may not be the nearest newspaper to the county in which the land is situated. And the newspapers of the adjoining counties may not be equally near to the county where the land lies. The question, which is the nearest newspaper to the county, must necessarily be determined by comparing the distances between the places of publication and the county line. That is the only way of ascertain-

ing the paper in which to give the notice. In this case there were four newspapers published nearer to the county than the one in which the notice was inserted. The notice should have appeared in the Alton paper, its office of publication being several miles nearer to the county than that of the Carrollton paper. The fact that the latter paper had a respectable circulation in the county, has nothing to do with the question. The owner has the right to insist upon a strict execution of this requirement of the constitution. He is not to be deprived of his estate except in the mode prescribed. The affidavit of the defendant was only *prima facie* evidence that the notice was published in the nearest newspaper. It was competent for the plaintiff to prove that the fact was otherwise. And when that was done, the sheriff's deed necessarily fell for want of a foundation upon which to stand."

There is a statute in New York which provides that "whenever any land, sold for taxes by the comptroller, and conveyed as herein before provided, shall, at the time of conveyance, be in the actual occupancy of any person, the grantee to whom the same shall have been conveyed, or the person claiming under him, shall serve a written notice on the person occupying such land, stating in substance the sale and conveyance, the person to whom made, and the amount of the consideration money mentioned in the conveyance, with the addition of thirty-seven and an half per cent. on such amount, and the further addition of the sum paid for the comptroller's deed; and stating also, that unless such consideration money and the said thirty-seven and an half per cent., together with the sum paid for the comptroller's

deed, shall be paid into the treasury for the benefit of such grantee, within six months after the service of such notice, that the conveyance of the comptroller will become absolute, and the occupant, and all others interested in the land, be forever barred from all right or title thereto. The occupant, or any other person, may, at any time within the six months mentioned in such notice, redeem the said land, by paying into the treasury such consideration money, with the addition of thirty-seven and an half per cent. thereon, and the amount that shall have been paid for the comptroller's deed; and every such redemption shall be as effectual as if made before the conveyance of the land sold. In every such case of actual occupancy, the grantee, or the person claiming under him, in order to complete his title to the land conveyed, shall file with the comptroller the affidavit of some person who shall be certified as credible by the officer before whom such affidavit shall be taken, that such notice as is above required was duly served, specifying the mode of service. If the comptroller shall be satisfied by such affidavit, that the notice has been duly served, and if the moneys required to be paid for the redemption of such land shall not have been paid into the treasury, he shall certify the fact, and the conveyance before made by him shall thereupon become absolute; and the occupant, and all others interested in the said lands, shall be forever barred of all right and title thereto." This statute is very similar to the provision in the constitution of Illinois, herein before recited, and the decisions in the one State, upon the construction of those provisions, are entitled to respect as authority in the other. Several cases have arisen in the superior courts of New York,

upon the construction of the statute of that State, which are entitled to great consideration. In *Jackson ex. dem. Watson et al. v. Esty*,¹ which was an action of ejectment, the lessors of the plaintiff claimed title under a tax sale, made during the existence of the statute above quoted. The comptroller's deed bore date April 22, 1823. Upon the trial of the cause, it was proven that at the date of the comptroller's deed, the premises in question were in the actual possession and occupancy of one Carpenter, who held the possession, or *betterments*, by a conveyance to himself, and one Day, but he made no claim or pretense of title to the land itself. It further appeared that in June, 1824, the defendant succeeded to the rights of Day and Carpenter, by purchase. The plaintiff proved that Day, in 1823, on being informed of the purchase at the tax sale, by the lessors of the plaintiff, said that he had no title to the land, and expressed a wish to buy of them; and also that the defendant proposed to purchase the premises of Watson, but the parties could not agree as to the price. This evidence was offered by the plaintiff as equivalent to a waiver of the notice required by the law, and which had not been given. It was objected to, but received by the judge, who charged the jury that such negotiations amounted to a waiver of the notice, if notice was necessary to a mere *naked possessor*. The defendant excepted, and the jury found a verdict for the plaintiff, which the defendant moved to set aside, which motion was sustained by the Supreme Court. Savage, C. J.: "It is a general rule that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed

¹ 7 Wend. R. 148.

depends on an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. Even the recitals in the deed of the performance of the acts necessary to validate the conveyance, are not sufficient; they must be proved independent of the deed. Perhaps a deed from the comptroller is an exception as to this particular, for the statute declares that such conveyance shall be conclusive evidence that the sale was regular, according to the provisions of the act; but it cannot be evidence of acts which were to be done subsequently. The comptroller's *certificate* is the proper evidence, and perhaps the only evidence, that the lands occupied at the time of conveyance have not been redeemed within six months after the service of the notice, which the purchaser must give. In case of a conveyance by the comptroller it has been decided, that where there was no tax due, the comptroller's deed was void, and confers no title. The right to sell depends upon the non-payment of the tax; the purchaser takes, therefore, a contingent title, and where the land is occupied, it depends further upon a *condition subsequent*, to be performed by the purchaser. To complete a title in such a case, it is as necessary to prove the service of notice and the omission to redeem, as it is to prove the sale; and where the fact of occupancy, at the date of the comptroller's deed, is shown, I can see no reason why it is not as necessary to produce the comptroller's certificate to prove a failure to redeem, as it is to

produce the comptroller's deed to prove the sale made by him. Both are necessary links in the chain of the purchaser's title, and both these facts, like all other facts, must be proved by the best evidence of which the nature of the case admits. The question then arises, whether it is necessary that the occupation must be by the *owner*, and whether the *occupant* can, by his acts, dispense with the notice required by the statute? The object of the legislature was to raise a revenue, with the least possible sacrifice to the citizen. The possessor of real estate is bound to pay the taxes, and when not possessed, the proceeding must necessarily be against the property. The legislature foresaw that it might happen that the property might not be occupied when assessed, and yet be occupied when sold for taxes; and that by the mistakes which might be made by the returning officers, property might be returned as *non-resident*, when in truth it was occupied. They wisely provided, therefore, that the purchaser should ascertain the fact at his peril, and give notice when necessary. The purchaser must, therefore, do every act necessary to perfect his title; he must not only give notice, but he must make proof of that fact, and that proof is the evidence upon which the comptroller is to act in the last instance. Now, I deny that these acts can be waived by a person having no interest in the property, even if they could by the former owner, on which point it is unnecessary to express an opinion. But if the offer to purchase be an admission of title, what kind of title does it admit? Clearly none other than the party had. The lessor has an *inchoate title*, which might be transferred by him just as it had been transferred to him from the

original purchasers at the comptroller's sale; and if the defendant had purchased the title of the lessors of the plaintiff, his title would not have been perfect. Trace it ever so far, and through ever so many hands, whoever sets up this title, must show that he has complied with the requirements of the statute, unless, indeed, the former owner were to purchase, and then such purchase might quiet the title, because there would be no one to disturb it. It is a cardinal principle, that a man shall not be divested of his interest in his property but by his own acts, or the operation of law; and where proceedings are instituted to change the title to real estate, by operation of law, the requirements of the law under which the proceedings are had, must be strictly pursued. I am accordingly of opinion, that the offer by the defendant to purchase the lessors' title, proved nothing, and that the plaintiff's title is imperfect, and will be, until he gives notice, and procures the comptroller's certificate according to the statute."

The next case in chronological order, which arose in New York, was that of *Comstock et ux. v. Beardsley*,¹ in which the defendant claimed under a deed from the comptroller, bearing date June 27, 1828, in pursuance of a sale for taxes. In answer to which the plaintiffs proved that one Bean occupied the premises in question, from 1824 to 1830; that from forty to seventy acres of the tract were cleared and cultivated, that Bean had a dwelling house on the premises, in which he resided, except during the summer of 1828, when he was from home, working out as a laborer; but during his absence his wife occupied the house, and a garden adjoining. The residue of the lot was

¹ 15 Wend. R. 348.

occupied by two individuals, under a lease from Bean, at thirty dollars per annum, who cultivated the *improved* part of the lot and made potash on the *unimproved* part. No evidence was offered of any *notice to redeem* given to the occupants of the land. The judge thereupon directed the jury to find a verdict for the plaintiffs *for so much of the land as was actually improved at the date of the comptroller's deed, but for no more*. The jury found accordingly. The plaintiffs having excepted to the charge, moved for a new trial, which was granted by the Supreme Court. Nelson, J.: "The material question in this case is, whether the whole of the premises in question were actually in the possession and occupancy of Bean, or any other person, at the date of the deed from the comptroller. If they were, then the title under that conveyance is defective for want of proper notice to redeem.¹ An occupancy that would constitute a good adverse possession of the entire lot, and which might ripen into a title in twenty years, was not within the contemplation of the statute. It was not intended to regard the title of the land thus sold, but the object was to afford to any person, who might happen to be an occupant at the date of the deed, an opportunity to redeem, presuming that he was either owner, or in some way legally interested in the land. The act for the assessment and collection of taxes² subjects the *occupant* to assessment and taxation for real estate, and it is only when lands are unoccupied that they can be returned as non-resident lands. This act and that of 1819 are *in pari materia*, and the term *occupant* used to convey the same idea in both of them. Though there was no person in occupation at the

¹ 7 Wend. R. 148.² Laws of 1823, p. 390.

time the assessment was made, and therefore the land must be returned as non-resident, yet, if an occupant is found there at the date of the deed, he must be called upon for the tax, together with interest and expenses that have accrued, before he can be dispossessed; and the occupancy and possession in the latter is just such an one as is contemplated by the act in the former instance. Now, it appears that Bean had occupied the lot for six years, from 1824 to 1830, except during the summer of 1828, when he was temporarily absent as a laborer, leaving his family on the premises, and renting the farm for the season to other persons. Upon these facts, would the assessors have been justified in returning the land as non-resident land? I think not. Bean himself, and by his tenants, was in the actual occupation and possession of the whole lot, and he clearly was taxable under the act of 1823. There existed no difficulty in giving the proper notice under the statute. Every necessary fact for this purpose could have been ascertained upon the premises.

The judge, I think, also erred in the distinction taken between the *improved* and *unimproved* parts of the lot, holding that notice was necessary before the title of the purchaser became perfect as to the former, but not as to the latter. I have already expressed the opinion that there was an occupation and possession of the *entire* lot, within the spirit and meaning of the statute, which is one answer to this distinction. But the act of 1819, incorporated into the act of 1823, provides that in case of every sale and conveyance for taxes, by the comptroller, of lands which, *at the time of the conveyance* are in the *actual possession and occupancy of any person*, a written notice shall be served

on *him*, or left at his *dwelling house*, stating in substance the sale and conveyance, to whom made, and the amount of consideration, after adding $37\frac{1}{2}$ per cent., and that unless the same shall be paid into the treasury, for the benefit of the purchaser, within six months, the deed to him will be absolute, and the occupant, and all others interested in the land, will be forever barred from all right and title to the same. The act then provides that the receipt of the treasurer, countersigned by the comptroller, stating the payment, and for what land it was intended to redeem, shall as effectually redeem it, notwithstanding the sale and conveyance, as if paid within two years after the sale. Now, in this case, the whole lot was sold for taxes in arrear, in *one parcel*; and it seems to me clear, upon the above section, that if *part* was actually occupied at the date of the deed, even if the residue is to be deemed vacant land, the occupant is entitled to redeem the whole; and if so, is entitled to notice for that purpose. The deed does not become absolute in respect to any part till such notice and default of payment; for in case of *every sale and conveyance* of land in the actual possession and occupation of any person, notice shall be served, stating, among other things, the amount of *consideration, the thirty-seven and a half per cent., and cost of deed*; and *the whole amount* must be paid, and when paid, the *whole purchase* is redeemed, and the title of the purchaser divested. The occupant cannot redeem without paying the whole purchase money, together with interest and expenses, though in possession of part only. He would have a remedy over against the owner of the residue. I cannot perceive how the purchaser can escape giving the notice, by consenting to take the

unoccupied part, since it is not distinguished from that occupied, by the statute, when both are included in one bid. If there is an occupant of part only, he is entitled to notice before his possession can be disturbed. Each notice calls for the whole purchase money. On failure to comply with its requirements, the whole title becomes absolute ; on compliance, the whole is defeated. As the purchaser may compel the occupant of part, upon notice, to redeem the whole lot or forfeit his share of it, it should not be left optional with him either to give such notice or compound with the occupant, and take the residue of the bid without notice."

In *Bush v. Davison*,¹ the plaintiff claimed to recover thirty acres of land under a deed executed, by the comptroller of the State, conveying ninety-five acres of land as sold for taxes, of which the thirty acres constituted a part. The tax deed bore date December 30, 1833. On the day of the date of that deed, one Phillips was in possession of a dwelling-house erected on the premises in question, as a tenant at sufferance to the defendant, and continued in possession until January 13, 1834, when he removed from the premises. A question was made upon the trial, whether the possession of Phillips did not *constructively* embrace fifty acres of unimproved land surrounding the house, as well as the house itself, he having originally entered as the owner of the fifty acres, which he conveyed by deed to the defendant on December 13, 1833. The judge charged the jury, that if they should find that Phillips was in possession of the fifty acres at the date of the comptroller's deed, exercising such acts of ownership as its situation in its unim-

¹ 16 Wend. R. 550.

proved state was capable of, then the plaintiff, having failed to prove the *notice* required by the statute to be given by *purchasers* to *occupants* of land sold for taxes, was not entitled to recover; but if they should find that his possession was limited to the dwelling-house, then it would be their duty to find a verdict for the plaintiff for the whole of the premises claimed, except the dwelling-house, as to which they must find for the defendant. The jury found a verdict for the whole of the premises, except the dwelling-house. The defendant moved for a new trial, which was granted by the supreme court. The opinion of the court was delivered by Cowen, J.: "If the question of constructive possession was material, there can be no doubt that on the evidence given, the judge properly left the question to the jury, whose finding must be received as conclusive. The plaintiff claims to have made title by operation of the statute; and the only question of any difficulty is, whether, within that statute, notice be necessary to the *actual occupant of any part* of an entire tract sold to pay non-resident taxes, before the comptroller's deed shall become absolute in respect to *any other part*, even though it be at the time vacant. The several provisions of the statute under which the plaintiff claims, are: [Here the judge recites the statute as given *ante*, p. 383, and proceeds.] Looking at the statute, no doubt can arise that the judge correctly restrained the recovery to the vacant and unoccupied land. Phillips being found in possession of the house at the time, the comptroller's deed would be inoperative as to that, according to the common understanding of the act, until notice of the purchase and default to pay the taxes; and such default proved and certified

at the comptroller's office. This was held in *Jackson v. Esty*, on a consideration of the various provisions now consolidated in the revised statutes. A compliance with all the terms prescribed to the purchaser, after the date of his deed, was by that case made necessary without any qualification arising from the character of the occupancy. In that case there was no claim or color of title, and an actual waiver by the tenant of notice was proved. No disclaimer which he can make, according to that case, can be received as of force to maintain an ejectment, even against himself. The deed, though issued from the comptroller's office with every apparent solemnity, carrying a title on its face, and made by Sec. 82 of 1 R. S., pp. 399, 400, 2d ed., conclusive evidence that the sale was regular, according to the provisions of the law, is yet standing alone, a mere nullity in respect to the occupant. I collect all this from the language of the late Chief Justice, at page 150 of *Jackson v. Esty*; and, indeed, no other view of the conveyance would warrant the decision in that case. The defendant was a mere squatter, claiming no title, and offering to purchase of the lessors of the plaintiff—a set of facts, which *per se*, and even without such a deed, would have entitled them to recover. According to my remembrance, on that cause going down for trial again, it was so contended, and the lessors tried to keep the comptroller's deed out of view, and recover on Esty's admission alone. But to prevent an ingenious evasion of the decision at bar, by the plaintiff stopping after the admission and disclaimer had been shown, I allowed the defendant himself to prove the deed, and then directed the jury to find against his admission. The late Chief Justice says, at the page cited, that such a

deed carries a contingent title, depending on the notice, etc., as a *condition subsequent*; and so, indeed, it does when the condition is looked to in its chronological order; but for the purpose of giving effect to the deed, I think he would have added that it was a *condition precedent* to all intents and purposes, and that without showing affirmatively the literal performance of it, the deed still remained mere waste paper, of no more effect than the sale under a mortgage power without advertisement, or the sale for United States taxes in *Jackson v. Shephard*,¹ to which the Chief Justice referred. We want no case beyond that to show the great strictness with which the forms, under which a title is to be divested by a sale for taxes, must be pursued. The difficulty with us circuit judges, who were called upon in the first instance to act upon the statute, lay in the novel form under which the condition came to us. A deed from the State, authorized by statute, and made conclusive of its own regularity, purporting to transmute the title, and actually delivered out to the purchaser, is yet made a mere escrow, *to be available* on the performance of a precedent condition. Looking at the ordinary legal effect of such a deed, under the statutory provisions, we should say it carried the title, which would be defeasible by the actual occupant paying the tax, after notice to him, or some other person paying for him; and that the right to redeem in that way, (for the word *redeem* is used in the statute,) would be limited to the actual occupancy, and was intended for the benefit of the owner. *Jackson v. Esty* had particular reference to the rights of the owner, and would not allow the actual occupant to waive the notice to his prejudice.

¹ 7 Cowen R. 88.

Next came the question on the meaning of the words *actual occupancy*, for it was only when the lands sold were in that state that notice was necessary. In *Comstock v. Beardsley*, which was ejectment by the original owner for land in Clinton county, the defense rested on the comptroller's deed of the premises, which were partly in the actual occupancy of another who claimed title to the whole. No notice had been given, and on the trial I restricted the defense to the part actually occupied. That was some years ago. A new trial was granted. This court declared the deed void for the whole. The present Chief Justice delivered the opinion of the court. The result was, that the statute, according to its true construction, operated to protect the possessor to the extent, not only of the actual occupancy, but the occupant's claim of right; and he added, that whenever any portion of the premises was actually used and improved, even though there was no claim beyond, the deed would not be effectual for any part of the land. On the cause coming down again at the last June circuit, an offer was made, as on the former trial, to limit the actual occupancy to one-fourth of the premises in question, and to prove the additional fact that the occupant never claimed anything beyond. That I overruled, and stopped the cause, on the distinct expression of the Chief Justice, *obiter* perhaps, but still a very explicit opinion, bearing the marks of reflection. I must be understood to speak from recollection, not now having notes of the opinion before me. And I do not stop to procure and examine the opinion, because, on reflection, I am satisfied that the Chief Justice did not, in either branch of it, go beyond what was warranted by the case of *Jackson v. Esty*,

the principle of which I had overlooked. The statute from which I have read all the provisions connected with that case, declares that whenever any land sold for taxes shall be in the actual occupancy of any person, the grantee shall give notice, etc., containing particular directions in respect to what must be done, and that in default of payment, *the conveyance* of the comptroller will become absolute. Then the *occupant or any other person* may redeem the land conveyed. Then, to complete *his title*, the grantee must prove to the comptroller the service of the notice, who is to certify the non-payment of the tax, and *his conveyance thereupon becomes absolute*. The condition is an entire thing; so is the conveyance and the title. So the tax, the land, and the right to redeem. The condition imposed by the statute has arisen, if a single foot of land was actually occupied. The words are, *if any land* sold, etc. What kind of condition? A condition precedent, which must be performed before the deed can operate to pass the title of the owner; or, in the language of the statute, before the grantee can 'complete his title to the land conveyed.' The deed is to be taken as if the statute were recited in it. That the condition is *precedent* will be more plainly apparent upon a further consideration of *Jackson v. Esty*. If it were subsequent, then, in common effect, ejectment would lie without notice, and a recovery of all the land might be had subject to the right of redemption by the occupant or owner, until he should yet be foreclosed by a notice, with proof and the comptroller's certificate. The statute was open to such a construction. That would have been treating the owner as a kind of mortgagor, holding an equity of redemption, the legal

estate being in another. But both *Jackson v. Esty*, and *Comstock v. Beardsley*, denied that there was any legal title in the purchaser upon which he could recover, until he had served the notice and the owner was in default; nor, as far as I know or have heard, has any action been thought of, for occupied land, short of this. The occupant has more than an equity; he has the legal right. According to *Jackson v. Esty*, the case is nearer that of mortgagor and mortgagee as it stands, since the revised statutes. All the legal estate of the latter is taken away, and his mortgage changed to a mere equitable lien, which cannot in general become a legal estate, for any purpose, until actual foreclosure. In *Jackson v. Esty*, the late Chief Justice remarked: 'I can see no reason why it is not as necessary to produce the comptroller's certificate to prove a failure to redeem, as it is to produce the comptroller's deed to prove the sale made by him.' The notice, the default, the proof and certificate of the comptroller, being a precedent condition imposed, as we have seen, whenever there is occupied land covered by the deed, it is then impossible to divide or apportion that condition, and say it is dispensed with in respect to the unseated lands, and the deed shall therefore avail as to them, though void as to the seated part. In the same way, where there are various occupants in severalty, the condition cannot be performed by piecemeal, being fulfilled as to A., though not as to B., and so on through the alphabet. If otherwise, the conveyance, which is also an entire thing, might be brought into existence by parts in the same way. It is said in Co. Litt. 215 *a*, that a condition is an entire thing, and cannot be divided. He instances the case of a condition subsequent, but I can

find in the books no attempt to apportion a legal title upon the ground that only some part of the condition precedent, on which it was to arise, had been performed. In the case at bar, Phillips was in possession of a small part of the land sold for taxes; and no notice having been given, we are of opinion that on the true construction of the statute, the deed was inoperative as to every part of the tract included in it. On that ground there must be a new trial."

In *Leland v. Bennett*,¹ the plaintiff claimed, under a tax deed dated May 13, 1832. For the purpose of defeating this title, the defendant proved that at the time of the comptroller's conveyance, the defendant, although residing some distance from the premises in question, held a paper title to the whole, and actually cultivated nearly an acre, in the north-west corner of the tract. It also appeared that the defendant had chopped over, and used for pasture, about three acres, that he had sold some timber off the lot, and his agent had made sugar from the trees growing thereon. The judge charged the jury, that if any part of the lot was occupied by the defendant, or any other person, at the date of the comptroller's deed, the defendant was entitled to a verdict, inasmuch as the plaintiff had failed to show that the notice required by the statute, had been given to such occupant. The jury rendered a verdict for the defendant, which the plaintiff moved to set aside, but the motion was overruled. Cowen, J.: "The cases relied on by the counsel for the defendant are decisive against the plaintiff's claim to recover by virtue of the comptroller's deed."² The privilege of a part claimant to

¹ 5 Hill R. 286.

² *Comstock v. Beardsley*, 15 Wend. R. 348; *Bush v. Davison*, 16 Ibid. 550.

redeem a part, if he choose, supposed to have been overlooked in those cases, does not vary the principle upon which they proceeded."

The case of *Smith v. Sawyer*¹ was an action of trespass *quare clausum fregit*. The plaintiff claimed under a tax sale and deed. The defendant insisted that the land was occupied at the date of the comptroller's deed, and that as no notice to redeem was given the occupant, the tax deed was void, and so the circuit court ruled, and its decision was affirmed in the supreme court, but the court of appeals reversed the judgment. The facts upon which the objection was founded, appear in the opinion of the court. Bronson, C. J.: "The lot in question contains two hundred and fifty acres of land, and the question is, whether the land was 'in the actual occupancy of any person' on the first day of August, 1845, the date of the comptroller's deed to the plaintiff. Lot number 84, in Duer's patent, is bounded on the west by lot number 57, and those two lots are bounded, in part, on the south by lot number 4 of the gore. There was a brush fence on and near the south line of lots 84 and 57, but the fence was crooked, and near the south-west corner of 84, included a small strip or nook of land, containing about two and a half square rods, in a meadow, upon lot 4. When, or by whom, the fence was made, did not appear. On the second day of July, 1845, nearly a month before the date of the comptroller's deed, one Baker took possession of lot 4 of the gore, under a contract to purchase the same from the plaintiff; and Baker, that season, mowed the meadow on lot 4, including the nook, which, on a subsequent survey, was found to be a part of lot 84. Baker did not know at the time that

¹ 3 Barbour S. C. R. 360; S. C. 4 Comstock R. 577.

the fence to which he mowed inclosed any part of lot 84. Vaughan, who, prior to July, 1845, held a contract for the purchase of lot 4 of the gore, never claimed to occupy or be in possession of any part of lot 84; nor was there any proof that those who had occupied number 4, ever claimed any part of lot 84, or that they knew or supposed that any part of that lot was included by the brush fence in the gore lot meadow, until Baker discovered the fact some time after he took possession. The fact seems to be, that the one who made the brush fence intended it should be on the line between the lots. But as the land was worth only three dollars per acre, and the fence was of a cheap and temporary nature, no great pains were taken to make it straight; and the strip in question, amounting to only one sixteen-thousandth part of the lot, and not of the value of five cents, was included in lot 4 by mistake. I have no doubt that the jury would have so found the fact, if the question had been left to their decision. But the judge refused to submit the question of occupancy to the jury, and non-suited the plaintiff. In all of the cases where it has been held that notice was necessary, there was a *substantial* occupancy of some part of the lot or parcel of land which had been sold by the comptroller, with an *intention* to enjoy the property, either by right or by wrong; while here the enjoyment seems to have been merely *accidental*, and without an intention to occupy any part of lot 84. I think there was no occupancy of the lot within the meaning of the statute. But if that was matter of doubt upon the evidence, the question should have gone to the jury. The judgment should therefore be reversed, and a new trial granted."

The conclusions to be extracted from the New York decisions, are 1. That the notice to redeem is a condition precedent to the validity of the comptroller's deed; that, although the deed of the comptroller is executed and delivered to the purchaser prior to the time when the notice is required to be given, it does not take effect until the comptroller certifies that the condition upon which its validity depended has been strictly performed. 2. That the comptroller's deed is not evidence of the performance of this *subsequent* condition. That the *onus probandi* upon this question rests on the party claiming under the tax deed. 3. That the certificate of the comptroller is the only evidence that the sale has not been redeemed from. 4. That in order to entitle the occupant to notice, it is not necessary that he should be in possession under claim or color of title, and that any person liable to pay the taxes, must be notified. 5. That a person in possession of the land at the date of the comptroller's deed, though the premises were vacant, or in the possession of another at the time the assessment was made, is entitled to the notice. 6. That a person in possession of a part of an entire tract, without title, color or claim of title, is yet entitled to notice; and that notice must extend to the whole tract, upon a portion of which he has intruded—the deed cannot be good in part and bad in part. 7. Not even the disclaimer of title by the tenant of the freehold, will enable the purchaser to recover, where he has failed to give the requisite notice. 8. And where the occupant is not the owner of the land upon which he is seated, he cannot, by any act or declaration of his, dispense with the notice required by the statute. 9. That an accidental or

chance occupation of a small portion of a tract, occasioned by a confusion of boundaries, does not entitle the occupant to notice—there must be an *intention*, on the part of the occupant, to enter and take possession of the specific parcel of land in controversy.

This particularity and prolixity of statement in reference to the law of Illinois and New York, was deemed necessary on account of the novelty of the principles involved in their construction. These laws are based upon a degree of justice to the owner of the land, which deserves to be followed by the residue of the States. When the conditions imposed by this class of laws are faithfully performed by the purchaser at the tax sale, he deserves more liberality at the hands of the courts, than one who purchases at a sale made under a statute which makes no provision for a redemption notice. The reason is, that in the one case the notice is actual, and in the other constructive. Courts always construe notices of the latter description more strictly than those of the former.

In reviewing the decisions of the courts detailed in this chapter, in relation to conditions subsequent to the tax sale, it will be observed that they uniformly require every condition, the performance of which is imposed upon the purchaser himself, to be literally performed; while, on the other hand, where the duty of performing the condition is cast upon the officers of the law, and they neglect to comply with it, some of the decisions assert the doctrine that this failure, on the part of the officer, ought not to invalidate the title of the purchaser. Such as has been shown is the rule in Ohio, in reference to the return of the sale; and in Pennsylvania,

in relation to the *filing* of the surplus bond. It is contended that there is a manifest distinction, between the neglect of the purchaser and that of the officer. This distinction thus contended for, is most strikingly illustrated by the decisions of the Pennsylvania courts in regard to the surplus bond. The purchaser is bound, at the peril of his title, to execute and deliver to the treasurer a bond, at the time and in the manner prescribed by law. If he fails to do so, this fact alone furnishes conclusive evidence of an abandonment of his purchase. But the duty of *filing* the bond, in the office of the prothonotary, being imposed upon the treasurer who made the sale, and who was required to receive the bond and cause it to be filed, the omission of this duty ought not to affect the title of the purchaser. It is impossible to perceive any just distinction between the performance of a condition precedent, and one which is subsequent to the sale, in regard to their effect upon the purchaser's title. He is bound, at his peril, to see that all of the requirements have been faithfully complied with, by the officers entrusted with the execution of the power prior to the sale, and *before* he has acquired any rights whatever; and it would seem that when his right has once attached — upon his bid and the payment of the purchase money — that greater vigilance is imposed upon him than before, in order to consummate and protect his title to the property. A still stronger reason is, that after an *inchoate* right has once vested in him by a purchase, the law gives him ample remedy to protect himself from the consequences of the neglect of the officer to perform a duty which the law exacted of the latter. He may compel the specific execution of the duty

by a *mandamus*, or seek his remedy by an action upon the case for the *non-feasance*. The title being regarded as *stricti juris*, he is bound to see that all of the requirements of the law are complied with. The condition, though subsequent in point of time, is, nevertheless, regarded in judgment of law as precedent to the acquisition of the title. The law authorizes a *sale AND conveyance, upon certain prescribed conditions*; the officer acting under a special authority, the purchaser being bound to see that he conforms to it, it is difficult to discern, why the conditions upon which the *deed* depends, should not be as faithfully performed, as those conditions which are required to precede the *sale*. In the last instance, the purchaser is bound to see that the law is strictly complied with, and no right having vested in him prior to the sale, the law arms him with no remedy against the officer for any neglect of his duty. But after the sale he has a remedy, and as he does not become entitled to a deed, until the conditions are performed according to the requirements of the law, he is chargeable with personal negligence, if he fails to pursue that remedy, and compel the performance of the official duty upon which the validity of his title is made to depend. If it is beneficial to the owner that the subsequent conditions should be performed, and they are not, it is an injury to him which, according to the acknowledged principles of justice, ought to invalidate the sale. It may be called a formality; but, where the formality prescribed, is founded on natural equity, it is said to be *substantial*, and its omission carries with it nullity of the act. It is of the essence of justice and natural equity, that when a forced sale of property is made under statutes, *all*

formalities which have the *semblance of benefit* to the owner, should be *rigidly* complied with. This class of sales cannot be likened to the sale of a sheriff, and the effect of his neglect to file or record the certificate of his sale. There the owner of the land is regarded as in court until the satisfaction of the judgment, and usually has actual notice of the levy. The authority to sell *and convey*, depends alone upon the judgment and execution. The purchaser is bound to look no further. No irregularity of the officer, either in advertising or selling the land, or in the performance of any duty, imposed upon him subsequent to the sale, can affect the title of the purchaser. But the power of the officer in tax sales depends upon a *series of acts*, which are required by law to precede, and follow the sale; each and every step, from the listing of the land for taxation to the consummation of the title, by the delivery of a deed to the purchaser, is a separate and independent fact. All of these facts, from the beginning to the end of the proceeding, must exist; and if any material link in the chain of title be wanting, the whole falls to the ground for want of sufficient authority to support it. Testing the Ohio and Pennsylvania cases, by these principles—and the New England decisions in relation to the return, deposit and record of the proceedings of the officer who made the sale—they cannot be sustained. The return of sale in the Ohio case, as has already been shown, was beneficial as well to the purchaser as the owner, besides being the only guide of the officer in the redemption or conveyance of the land. The surplus bond, required by the laws of Pennsylvania, constituted a lien upon the land purchased, in favor

of the former owner of the estate. The filing of it in the office of the prothonotary, where the evidence of judgment and mechanics' liens were preserved, was intended to give notice to subsequent purchasers and creditors, and was, therefore, beneficial to them as well as to the owner. In conclusion, to use the language of one of the courts, "it is easier for the purchaser to see that the duty is performed, than it is for a judge to assign reasons why it may be safely omitted."

CHAPTER XVIII.

OF THE AUTHENTICATION OF THE DIFFERENT DOCUMENTS.

THE rule is well settled, that every public document, which is required by law, to be executed by a public officer, and preserved as a memorial of the facts recited in it, must be *verified by the official signature of the person who made it*. The object of the rule is the identification of the document as an official act, executed by authority of law ; and its spirit is answered only, when the official character of the person making it is established, and the document appears upon its face to be an official act, attested by the signature of the officer. The reason of the rule is obvious. No man has the right to bind another by a written statement, unless he has authority to make such a statement, either from the person to be affected, or the laws of the land, by which all are bound. All written instruments executed in pursuance of private authorities, show upon their face the representative character of the person executing them. The agent executes in the name of his principal, signs the name of the principal, and attests the paper by his own signature ; else, he alone is bound by it. Chief Justice Parker, in

Stackpole v. Arnold,¹ says: "It might be sufficient for the decision of this cause to state, that no person, in making a contract, *is to be considered as the agent of another*, unless he stipulates for his principal by name, *stating his agency in the instrument which he signs*. This principle has long been settled, and has been frequently recognized; nor do I know of an instance in the books of an attempt to charge a person as the maker of *any written contract*, appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal, on whose behalf he gave his signature. It is also held, that whatever authority the signer may have to bind another, if he does not sign as agent or attorney, *he binds himself and no other person*." An additional reason why every act of an officer should bear upon its face evidence of its official character, is, that in this country every officer is responsible to the government and parties interested in his acts, for all injuries occasioned by his acts or omissions under color of his office; and in actions against him it is not just that the injured party should be compelled to resort to a weaker species of evidence—depending upon memory, and subjected to the risks attending death, absence and insanity—to prove the legal identity of an official document. The reason of the rule applies more strongly to the execution of all *public* authorities, whether conferred by general or special laws, where the exercise of the power affects the property of the citizen. The authority is conferred without his consent, he is not consulted in the selection of the agent, he cannot control the acts of the officer, nor is the officer answerable to him for

¹ 11 Mass. R. 27.

his conduct. The authority is delegated by law, it is reposed in the officer, not the man. He acts in an official capacity. But for the protection of the law he would be a trespasser in exercising the power, and responsible to the citizen for his acts. When therefore he attempts to execute the power, he must recognize the source from whence he derives it, follow the requirements of the law, and perform all acts in that character alone which the law recognizes, otherwise the act is a nullity. The principle is uniformly conformed to by all of the great departments of government. The proclamations of the king bear upon their face the official character of the act. The process of the courts run in his official name, are attested by his chief judicial officer, and authenticated with the seal of the court. The presiding officers of the two houses of parliament authenticate the passage of all bills, and the legality of warrants, by their official signatures. And in this country, every officer, from the president down to an overseer of the poor, verifies in this manner his official acts. The rule extends to all official documents connected with the sales of land for the non-payment of taxes. The statute of Vermont required the collector to advertise the delinquent list before selling the lands of non-residents, to deposit with the town clerk the newspapers containing the advertisements, and the clerk was directed to record them at length in a book to be kept for that purpose. In *Spear v. Ditty*,¹ the defendant relied upon a tax title, and offered in evidence the record of the town clerk, headed "*collectors' advertisements*." The record showed that the advertisements were simply signed "E. Spaulding," without

¹ 9 Vermont R. 282.

the addition of the word "COLLECTOR." In the form of the advertisement prescribed by law, the official title was added. The court held the sale void for the omission in the record of the town clerk. The court remarked: "It is not true that every man is presumed to be clothed with and to be exercising an official capacity, because it seems to be needed for what he was attempting. Such a principle would sweep away all official signatures and designations. The statute form must be strictly followed. Even a known public officer must so sign every official document. It is difficult to see how any one can act *officially* on paper, and not so state on the paper. It must appear on the publication, by what power, and in what capacity, the person acts. And this cannot be supplied by the record, headed 'collectors' advertisements.' The advertisement in this case was not signed by Spaulding as collector, nor did it in any way so import, and the landholders were therefore no way informed that the signer of that advertisement had any more right, than any other man, to give such notice, nor that he had such power as he undertook to exercise." In *Isaacs v. Shattuck*,¹ it appeared that the person who made the sale, was both collector and town clerk; in the former capacity he was required by law to sell and return the proceedings; in the latter he was to record the return and certify to the due publication of the advertisement. His certificate was signed "Jonas Stone, collector." The sale was held void. The court, referring to the case of *Spear v. Ditty*, said: "It has been decided that when one signs his name only, omitting the official designation, it is the same as if the *signature* had been omitted, so far

¹ 12 Vermont R. 668.

as any official validity is concerned. It is difficult to perceive then, how the use of a wrong designation of office should be of any greater force or validity. We must then, in the most favorable view, consider the record in the handwriting of a stranger, and not certified by the town clerk. This, we think, is not sufficient in a case like the present, where, with great propriety, the utmost strictness of construction has always been required."

It has already been shown that the assessment list must be verified by the official signatures of the officers charged by law with the duty of making it.¹ In *Taylor v. French*,² where the collector was required to file copies of the advertisements with the town clerk, whose duty it was to record them at length, and certify to the fact and particulars of the publication, the facts were, that following each advertisement there was a simple statement of the clerk that the same was inserted in a certain newspaper, giving the name, volume, number, date, and place of publication of the paper, but none of these statements were verified by any signature, private or official; but at the end of the record, the town clerk certified that "he then (October 16,) received the above and foregoing eighteen advertisements for record, and recorded the same from pages 42 to 50," and attested the same. The record was held insufficient. By the court: "It is evident that this certificate must be confined to the recording of the advertisements, and cannot extend to the statements in regard to their publication. It does not profess to extend any further. Neither does the certificate of the town clerk state that he

¹ *Ante*, p. 138; *Johnson v. Goodridge*, 15 Maine R. 29; *Colby v. Russell*, 3 Greenl. R. 227; *Foxcraft v. Nevins*, 4 Ibid. 72; *Kellar v. Savage*, 20 Maine R. 199; *Sibley v. Smith*, 2 Mich. R. (Gibbs) 498.

² 19 Vermont R. 49.

received of the collector the newspapers themselves, in which the publications were made, and that he made the records of the advertisements from the papers themselves. We think the title under the vendue defective for these reasons." In *Hannel v. Smith*,¹ where the auditor of State was required "to transmit to the county auditor lists of land which have been forfeited, etc., said lists to be certified and signed by the auditor of State, and to have thereto affixed his seal of office," and it appeared that the list in question was signed "John Brough, auditor of State, by J. B. Thomas," and the seal of the auditor's office was not attached to the list, it was held void. By the court: "This was not such a verification of the list as the law required. It was not even signed by the auditor, but by J. B. Thomas. And who is J. B. Thomas? Plaintiff's counsel answer, the deputy of the auditor of State; and the auditor of State signed by his deputy. By what authority? It is replied, by the authority which every public officer has to act by deputy. I know that some public officers may act by deputy, such as sheriffs' clerks, etc., but I have yet to learn that the auditor of the State of Ohio can act by any other authority than the one prescribed by law; that is, the chief clerk in his office. Thomas, however, does not sign as deputy, nor as chief clerk. This instrument is not only without the signature of the auditor, but it is not verified by his official seal, nor is it therein certified that the list to which it is attached is correct. It is defective, and would no more authorize the county auditor to sell the land contained in the list, than a letter written by the clerk of a court, and directed to the sheriff,

¹ 15 Ohio R. 134.

informing him that a judgment had been rendered in a certain cause, would authorize that sheriff to levy upon and sell the lands of a judgment debtor." In *Taylor v. French*, it was the duty of the collector to return his proceedings, verified by his official signature. The facts were, that two adjournments of the sale had taken place, which was attested by his signature, but no other part of the proceedings were thus verified. The return was held void. By the court: "The collector having simply signed his name to the two adjournments, it cannot be a signing of the anterior proceedings. It in no way professed to be so. This objection is fatal to the validity of the vendue."

On the other hand, where the official character of the act does, with reasonable certainty, appear upon the face of the document, slight variances and omissions will not destroy its validity. Thus, in *Isaacs v. Wiley*,¹ where the record of the advertisement showed the name of Luther W. Brown as collector, whereas Luther H. was appointed to that office, it was held sufficient. By the court: "In the present case, in the absence of proof that two persons bearing the same name, and distinguished by these initial letters, reside in the same town, it certainly does not require a very great stretch of credulity to admit the construction that one person was *appointed* to this office, and that another *intruded* himself into his place, and assumed the burden of his duties. We think it more rational to treat the names as being the same, but capriciously varied to suit the taste or whim of the recording officer." In *Sheldon v. Coates*,² James Hillman was sheriff of Butler county, and *ex officio*

¹ 12 Vermont R. 674.

² 10 Ohio R. 278.

collector of taxes. The certificate of sale signed by him was in his capacity of *collector*, and it was held valid. By the court: "It is a general rule, in sales by public officers, that where there is a sufficient power to warrant a sale, a slight variance or omission will not be held to be material.¹ But this, it is said, is a sale for taxes, where principles *stricti juris* are to be applied. To this argument it may be answered, that no substantial variance from the provisions of the statute, so far as the signature of Hillman to the certificate of sale is concerned, is by us perceived, etc. Hillman, being by the act made collector, by virtue of his office as sheriff, it seems to us there can be no objection to the certificate, whether signed by him in the *one* or the *other* capacity. *Pro hac vice*, sheriff and collector are synonymous terms." But it has been shown² that where the same person holds the same office, and the law requires him to act in each of his official characters in the course of a tax proceeding, and he gives the wrong designation of office in authenticating an act, this stands upon the same principle as if he had added neither official designation. In *Farrar v. Eastman*,³ where the law provided that if any proprietor of common lands should neglect to pay the tax assessed upon his share, the proprietors were authorized to sell and convey the interest of the delinquent. One of their number being delinquent, they sold his share, and afterwards voted that "the *collector* be empowered to give a deed." John Knox was the collector of the proprietors, and made the deed in question. It was held valid. By the court: "If a deed, vote, or other

¹ 5 Cowen R. 530.

² *Ante*, p. 411.

³ 5 Greenl. R. 345.

transaction, be susceptible of a construction consistent with law, and with a rightful authority in the party or parties granting, voting or acting, that construction should prevail. 'It is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment which standeth with the law, shall be taken.'¹ It was competent for the proprietors to appoint the same person to sell and convey, and a designation of the person as a committee to convey by the name of his office of *collector*, is sufficiently certain. The incumbent of the office at the time, is intended. The collector was John Knox — the vote designates the collector — John Knox, then, was intended."

¹ Co. Litt. 42, a.

CHAPTER XIX.

OF THE CONFIRMATION OF THE SALE.

IN some of the States, the law requires the consent, approbation or confirmation of the sale and conveyance, by some court of record. Where such is the requisition, it must be complied with, or no title vests in the purchaser. It is a general rule of law, that where the consent of any third person is required to the execution of a private power, that, like every other condition, must be strictly performed.¹ And when the consent of a third person is required to a deed, in order to its validity, it can have no operation until that consent is given.² There are numerous treaties between the United States and Indian tribes, whereby the latter have ceded their territorial rights to the former, reserving a specific quantity of the granted lands in favor of particular Indians or half-breeds. Such was the case with the Winnebago treaty of 1829. In that treaty it was provided that the reservee should not sell and convey the land without the consent and approbation of the President of the United States. Unless such consent is given by the President, the title of the Indian reservee does not

¹ *Sugden on Powers*, 263-5; *Hawkins v. Kemp*, 3 East R. 410; 10 Vesey R. 308.

² 5 Wend. R. 532.

pass. In that case the object of the provision was to guard the Indian against fraud and imposition; and it is the practice of the Indian Department, not to submit a deed, executed by an Indian, to the President for his approval, until it satisfactorily appears that the land brought its fair market value, and that the consideration has been paid or secured.¹ Where an act of the legislature, or order of a court, requires the approval or confirmation of the sale, it is void without it.² The same principle is more strongly applicable to a tax sale and deed, when a confirmation of them is required by law. The Ohio statute of January 30, 1822, requires a confirmation and approval of the sale, by the court of common pleas of the county where the land lies, and the entry of an order, directing the execution and delivery of a deed to the purchaser.³ In *Northrup v. Devore*,⁴ it was held that an order of confirmation, which misrecited the day of sale, was a nullity. In no case will the confirmation aid a void title.⁵

A statute of Arkansas, passed November 18, 1833, provided "that the purchaser, or his heirs or legal representatives, may at any time after the expiration of the term allowed for such redemption, publish a notice six weeks in succession, in some newspaper printed at the city of Little Rock, calling on all persons who can set up any right to the land so purchased to show cause at the first term of the circuit court, which may be held in the county in which such lands are situated, six months after the publication of such

¹ 9 Peters R. 711; *Opinions of the Attorneys General*, ed. 1852, vol. 2, pp. 465, 574, 631; vol. 3, pp. 209, 259; vol. 4, p. 529.

² *Williamson v. Berry*, 8 Howard U. S. R. 495-6; *Young v. Keogh*, 11 Ill. R. 642; *Rea v. McEachron*, 13 Wend. R. 465; *Curtis v. Norton*, 1 Ohio R. 336.

³ *Wilkins v. Hughes*, 9 Ohio R. 154.

⁴ 11 Ohio R. 359.

⁵ *Barger v. Jackson*, 9 Ohio R. 163.

notice, why the sale so made should not be confirmed." In *Black v. Percifield*,¹ the defendant in error filed his petition, setting forth a purchase at a tax sale, and praying a confirmation. The plaintiff in error filed her answer, setting forth that she was in possession of the land, and pointing out irregularities in the sale. The answer was held insufficient. By the court: "In her plea, by way of answer, she does not aver how, or in what manner she came by the possession, or under whom she holds, or whether her possession is adverse to the petitioner or not. The duty devolves upon her to show the kind and character of the possession, and if she failed to do so, the legal presumption is, that she either holds under the petitioner, and is his tenant by lease and entry, or that she is a mere *tort feisor*, without any shadow or pretext of right, and in either event she is not entitled to the privilege of opposing the confirmation."

¹ 1 Arkansas R. 472.

CHAPTER XX.

OF THE LOCATION OF THE LAND SOLD.

IN sales of this character the law requires a specific location, and certain description of the land sold, in all cases where a less quantity than the entire tract offered, is struck off. In some instances, the officer making the sale is authorized to elect in what part of the tract the quantity sold shall be located, and announce his election to the bidders previous to the sale. Thus, in the Illinois statute of February 19, 1827,¹ it is provided that "the sheriff shall proceed to sell said property, or so much of it as shall bring the amount of tax and cost, and the officer selling, shall, previous to the sale, designate in what part of the tract the part sold shall be located, and shall give his certificate and make his deed accordingly." In other instances, the law itself locates the land sold, without the intervention of any agency whatever. This was the case in the Illinois statute of February 26, 1839,² which declared that "when a portion of the tract shall have been struck off on any such bid, it shall be taken off the east side of said tract, extending the whole length on the east side, and so proportioned in width as to embrace the number of acres sold as

¹ Gale's Statutes, 566, Secs. 24 & 25.² Sec. 35.

aforesaid." In the States of North Carolina and Kentucky, the law authorized a sale of the least number of acres without designation in terms, or authorizing the officer selling to locate the part sold, but directing the officer to execute a certificate of the *quantity* sold, which constituted the authority of the county surveyor, to make a location of the part sold by actual survey; and upon the return of the survey, the officer who made the sale was required to convey to the purchaser, according to the metes and bounds of the survey thus made and returned.¹

Where a conveyance is made of a certain number of acres, without locating it in any particular part of the tract, the conveyance confers no election upon the grantee to locate the quantity purchased, but the deed must be held void for uncertainty.² The present statute of Illinois provides, that when a less quantity than a whole tract shall be sold, the part purchased shall be located on the *east side* of the tract. In *Spellman v. Curtenius*,³ the description of the land offered for sale was: S. W. and S. E. 9. T 8 N. R. 8 E., and the sale was of one acre off the east side of the two parcels; the two quarters were fractional, ran to a point on the east, and therefore, strictly speaking, had no eastern side. By the court: "The intention of the law is, where less than the whole tract is sold for taxes, that the quantity sold shall be taken from the eastern part of the tract, and a line is to be drawn due north and south, far enough west

¹ *Currie v. Fowler*, 5 J. J. Mar. R. 145; *Jones v. Gibson*, Taylor, N. C. R. 41.

² *Erwin v. Helm*, 13 S. & R. 151; *Haven v. Cram*, 1 Adams N. H. R. 93; *Jackson v. Delancy*, 11 John. R. 373; S. C., 13 Ibid. 551; *Jackson v. Roosevelt*, 13 Ibid. 97. The opposite doctrine is asserted in *Coze v. Blanden*, 1 Watts R. 533; but it is so utterly repugnant to the general principles of law, that it cannot be sustained.

³ 12 Illinois R. 409.

of the most eastern point of the tract of land sold, to make the requisite quantity. The law must have a practical effect, and because a tract of land does not happen to be in a form, so as to have, strictly speaking, an east side, it is not to be presumed the legislature intended such tract to be exempt from this general provision of the revenue law. To give it such a construction, would be emphatically *sticking in the bark.*" But upon the same identical state of facts, the tax deed was held void, in *Ballance v. Forsythe*.¹ McLean, J., in delivering the opinion of the court, said: "In these two fractional sections, there appear to have been about 150 acres. It is not said in what form the acre is to be surveyed. Certainty in such a case is necessary to make the sale valid, for on the form of the acre its value may chiefly depend. And there is nothing on the face of the deed, or in the proceedings previous to the sale, which supplies this defect." It may be added, that the same want of specific locality of the land sold, which would render void the anterior proceedings, will also establish the invalidity of the deed.

¹ 13 Howard U. S. R. 18.

CHAPTER XXI.

OF THE AMENDMENT OF THE PROCEEDINGS.

It may be laid down as a general rule, that the power to correct an error committed in the progress of a proceeding, exclusively belongs to courts of justice, and has no application whatever to the proceedings of ministerial officers. The common law, independently of any statutory provision upon the subject, recognizes the power of the courts in all cases, in furtherance of justice, to amend their proceedings while in paper; that is, until the judgment is signed and perfected, by its record and that of the anterior proceedings; but no amendment was allowable, according to the strict rules of the common law, after the ending of the term in which the judgment was pronounced. Prior to that time, the proceedings were regarded as *in fieri* only, and consequently subject to the control of the court. But by the English and American statutes of amendment and jeofaial, the power of the court to amend the record of their proceedings, has been greatly enlarged, and amendments may now be made where the justice of the case requires it, after a motion in arrest of judgment, upon writ of error, and even after execution has been issued, executed and returned. This power of

amendment belongs to superior courts of record alone. No inferior court possesses it. No ministerial officer is permitted, according to the principles of the common law, to exercise such a power, where the rights of third persons are concerned, for the simple reason that he possesses no legislative or judicial power. To the latter departments of government the power of amendment alone attaches. The executive officers of the law act at their peril in every instance, where they are entrusted with a power over the rights of the citizen, and are not under the supervisory control of some court of record, touching the regularity of their proceedings. Besides, no amendment is ever permitted in any case, where the rights of parties in interest are to be affected, except upon notice; and notice is required in judicial proceedings alone. The acts of ministerial officers are to be tested by the law which authorized them. When the act is completed, their power is *functus officio*, and if in the record, return or other evidence of their acts, they have failed to conform to the requisitions of the law of the land, or to state the facts as they actually transpired, the error cannot be obviated by an amendment, because their power over the subject is exhausted. By the record, as originally made, their acts must stand or fall.

Upon these principles, it is impossible to sustain a power in the officer who sells land for the non-payment of taxes, or in any officer connected with the proceedings, to amend the record of their acts after they have once been made. In *Blight v. Banks*,¹ the return of the register showed a sale of 1900 acres, while the certificate of the sale called for 4900 acres;

¹ 6 Munroe R. 206.

afterwards, the return which had been recorded in the auditor's office, was altered by the auditor to correspond with the certificate. The proceeding was held void. By the court: "As the entry and return of the sale by the register, and the record in the auditor's office is kept in the custody of the officers of the law, and the certificate is kept by the purchaser, and operates as a mere memorandum directory to the surveyor, and has no validity in passing the title, we concede the preference to the record, and conceive it ought to prevail as fixing the true quantity. And although the return of the register, and record of the auditor, have since been changed by the auditor, to conform to the certificate, yet this change was not authorized, and we cannot deem the sale valid for more than 1900 acres." The same question was decided in *Blight v. Atwell*.¹ The whole doctrine of amendment was discussed, and the power sustained, in *Gibson v. Bailey*.² The facts were, that the return of the posting up of the warrant for the town meeting, at which the tax was levied and the officers elected, was illegal. It did not appear, from the return, when the warrant was posted up, nor that it was posted at a public place. Nor did it appear upon the face of the town records that the collector took the oath of office prescribed by law. A motion was made to permit the record and return to be amended. By the court: "It has already been settled that the record of towns may be amended to conform to the truth of the fact. The amendment must be made by the person in office at the time. The form in which such amendments are to be made, has never yet been settled. It will be very dangerous to sanction alterations of the books

¹7 Munroe R. 268.²9 N. H. R. 168.

themselves, by erasures and interlineations. And we are of the opinion that they should be made only upon evidence showing the truth of the facts, and then, by drawing out in form the amendment which the facts authorize. The amendment, with the order under which it is made, may then be annexed to the books where the original is recorded, so that the whole matter will appear; and, in furnishing copies, the original and amendment should both be furnished.

But it is objected by the demandant, that no amendment ought to be made to her prejudice. That when she purchased, these defects in the vendue title were apparent; and that she must be presumed to have purchased with knowledge that the title was defective. The general rule is, that amendments of records are made with a saving of the rights of third persons, acquired since the existence of the defect. To apply this rule, to all cases of defects in sales of land for taxes, would, in effect, be very nearly denying a right to amend; as the owner would attempt to defeat any amendment, by conveying to some friend, who would bring a suit in his behalf. It would, at least, be necessary to confine the application of the principle to cases where the land had been actually conveyed *bona fide*. But instances might exist where the purchaser, although he might not have found upon the records all that was necessary to make a formal and valid record, might have been well assured, from what he did find, that all that was necessary had in fact been done. Where what is necessary is, although not formally stated, so far set down as to lead to a belief that a correct record might have been made, there seems to be no reason why a purchaser,

who has access to the records, should not take it subject to a right to have the record put in form, if the truth will warrant it. Where, on the other hand, nothing appears upon the record, in relation to any particular fact necessary to make out a title, nor is anything set down, from which it is naturally to be inferred that the fact existed, a *bona fide* purchaser ought not to have his title defeated, by supplying a record, instead of amending a record." The motion in that case was allowed, on condition that the proposed amendment accorded with the facts. There does not seem to be much objection to this doctrine, by which the rights of third persons are saved, and the power is confined to cases when the law has, in fact, been complied with by the officers, but a record of their proceedings has been imperfectly made up, and where sufficient evidence of the compliance appears upon the face of the record, either in express terms, or by legitimate inference, from the facts actually stated. Indeed, in such cases, the court would uphold the title of the purchaser, without any amendment at all; treating all defects as amended, which, according to the general principles of law, might be amended. Such was the doctrine asserted in *Atkins v. Hinman*,¹ where, in a collateral action, amendments of the tax record were permitted in the circuit court, and the supreme court sustained them upon the ground, that they were only the correction of clerical mistakes, and could prejudice no person's rights; that they brought no new matter into the case, and gave no additional efficacy to the proceedings, but simply put them in stricter conformity to the provisions of the statute. And it must be

¹ 2 Gilm. R. 451.

remembered that these amendments were of the judgment and precept under the Illinois statute of 1839, and the anterior proceedings upon the files of the court, furnished the facts whereon the amendments were based. In *Pitkin v. Yaw*,¹ a motion was made to amend the precept, in an action of ejectment. Upon the trial of the cause, it was refused. Treat, C. J.: "If such an amendment is allowable, it should only be made upon a distinct application to the court for the purpose. The application should have no connection with any other case. A contrary practice would introduce much confusion into judicial proceedings. A court engaged in the trial of a case, ought not to be delayed and embarrassed by a motion to amend the record of another proceeding, which is but collaterally in question before it. Such an application might involve the necessity of bringing other parties and different interests before the court." It was intimated, in *Young v. Thompson*,² that a judgment upon the delinquent list, might be amended by adding the date of its rendition, upon a proper application. It is not allowable, in any case, for a ministerial officer, either with or without the permission of a superior court, so to amend his record of the proceedings, as to render a sale valid, which was not valid before, or to vest a title in the purchaser, or to divest the title of the owner, if the sale was not already perfect.³ If an amendment is allowed in any case, there must be some limit, in point of time, to the exercise of the power; and there is no safer rule to adopt, than the analogy to be drawn from the limitation of writs

¹ 13 Illinois R. 251.

² 14 Illinois R. 380.

³ *Judevine v. Jackson*, 18 Vermont R. 496; *Langdon v. Poor*, 30 Vermont R. 13.

of error and bills of review. In *Means v. Osgood*,¹ the amendment of an extent was refused, where six years had elapsed and the rights of third persons had intervened. In no case will an amendment be allowed, except upon notice to the parties in interest.² And in every instance, there must be something upon the face of the proceedings to amend by — *something* to show that what is sought by the amendment was originally designed, but has been omitted by mistake or misprision.³

¹ 7 Greenl. R. 147.

² *O'Connor v. Mullen*, 11 Illinois R. 57 & 116.

³ *Lake v. Morse*, 11 Illinois R. 587.

CHAPTER XXII.

OF THE TAX DEED.

THE tax deed is the instrument, whereby the officer of the law, undertakes to convey the title of the rightful proprietor, to the purchaser at the tax sale. This deed, according to the principles of the common law, is simply a link in the chain of the grantee's title. It does not *ipso facto* transfer the title of the owner, as in grants from the government, or in deeds between man and man. The operative character of it depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises upon the mere production of the deed, that the facts upon which it is based, had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposed upon them — every condition essential in its character — then the deed becomes conclusive evidence of title in the grantee, according to its extent and purport. We have seen, however, that in some instances the deed is declared by statute to be *prima facie* evidence, either of all the facts recited in

it, or of a strict compliance, by the officers, with every requisition of the law. In all such cases, the deed is evidence of title to the extent of the interest attempted to be conveyed.¹ But the instant it is shown, by the party claiming adversely to the deed, that any substantial prerequisite of the law has not been complied with, the *prima facie* character of the deed is destroyed, all of its presumptions overthrown, and the deed becomes mere "*waste paper*."² And inasmuch as the evidence necessary to destroy the presumptions raised by such a deed, is of a negative character, the law does not require of the adverse party, plenary proof; it is enough that he introduces such evidence, as in the absence of all counter testimony, will afford reasonable ground for presuming that the negative allegation is true; and when this is done, the *onus probandi* is shifted to the party claiming under the tax deed. The *prima facie* character of the deed, as established by the statute, being thus overthrown, the principle of the common law again attaches to the transaction, and the grantee in the tax deed, or those claiming under him, must prove, by satisfactory evidence, the regularity of the proceedings.³ This principle conforms to the general law, regulating the proof of negative averments.⁴ It has been attempted to be shown, that the legislature cannot, constitutionally, declare a tax deed *conclusive* evidence of a *material* fact, upon the *existence* of which, the *power to sell and convey depends*,⁵ though they may do so in

¹ *Ante*, Chapter 3.

² *Sibley v. Smith*, 2 Mich. (Gibbs) R. 486; *Graves v. Bruen*, 11 Illinois R. 431; *Turney v. Yeoman*, 16 Ohio R. 24; *Fitch v. Casey*, 2 G. Greene R. 300.

³ *Graves v. Bruen*, 11 Illinois R. 441; *Sibley v. Smith*, 2 Mich. (Gibbs) R. 486.

⁴ 1 Greenl. Ev., Sec. 78; *Calder v. Rutherford*, 3 Broderip & Bing. R. 302.

⁵ *Ante*, pp. 100-3.

relation to *formal* requisitions. It is now proposed to examine the law of tax deeds in detail. 1. The deed must be written, or printed, on parchment or paper,¹ or it may be partly written and partly printed. It is said, however, that greater effect is to be given to the *written* part of a contract or deed, where it is written in part and printed in part, and it is doubtful upon the whole instrument, what the intent of the parties was.² 2. The deed must be sealed. The statutes usually require, in terms, the sealing of the deed. This was a requisition in the statute of Illinois, of January 26, 1826.³ But sometimes the statute simply directs the officer to execute "*a deed of conveyance.*"⁴ This *ex vi termini* means an instrument in writing, sealed and delivered, and whatever else is necessary to constitute the solemnity of a deed according to the principles of the common law.⁵ Besides, it is an established principle, that no estate of freehold, for life, in fee or in tail, can pass by an instrument or writing not under seal.⁶ And where the general statute law of the State declares that the manner of conveying freehold estates, shall be "by writing, sealed and delivered," that law is as applicable to conveyances made by a public officer as to those executed by private individuals. Such was the rule laid down in *Doty v. Beasley*,⁷ which was an action of trespass for cutting down and carrying away timber, and the defendant justified under a tax sale. By the court: "He (the defendant) claims title by virtue of

¹ Co. Litt. 229 a.; 2 Bl. Com. 297; 14 John. R. 491; 2 M. & S. 288.

² 3 Kent Com. 260; 4 East R. 136.

³ Laws 1826, p. 78.

⁴ R. S. Illinois, 1845, p. 447, Sec. 71.

⁵ 1 Bibb R. 333; 12 John. R. 197.

⁶ *Jackson v. Wood*, 12 John. R. 73; *Same v. Wendell*, Ibid. 355.

⁷ 2 Bibb R. 14.

a purchase made from the register at his sales for taxes, the 28th day of November, 1800, and obtained a certificate of the purchase. On the 23d of October, 1805, he procured from the register, what (we presume) was intended by them as a deed of conveyance. It is signed by the register, but he has failed to annex a seal to it. The act regulating conveyances, approved December 19th, 1796, declares 'that no estate of inheritance or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered.' This general regulation must have operation upon all conveyances, whether made by private individuals or public officers, unless there be some subsequent act changing its provisions. We have not found any provision to that effect." The same principle was applied to a tax deed in *Shortbridge v. Catlett*.¹ It is presumed, however, that under those statutes which authorize the sale and conveyance of a leasehold interest in lands, as in New York and South Carolina, the lease need not be under seal.² The manner of sealing will of course depend upon the laws and usages of each State where the deed is executed. Under the old revenue laws of Illinois, tax deeds made by the auditor of State, were sealed with the official seal of the auditor's office. Under the present laws, they are authenticated by the private seal of the conveying officer. And it is presumed, that in all cases where the statute directs the execution of a tax deed, and is silent as to the manner of sealing it, the common law mode may be

¹ 1 A. K. Mar. R. 587.

² *Fry v. Philips*, 5 Burr. R. 2887; *Holliday v. Marshall*, 7 John. R. 211.

adopted, that is, the private seal of the person who executes the deed. Such are the decisions in Pennsylvania, relative to deeds executed by the county commissioners of the county, for lands sold at tax sales; and where they use the seal of the county to authenticate the deed, it is held void.¹ But it may be read in evidence, as the basis of an adverse possession.²

3. It is essential to the validity of a tax deed, that it should be delivered by the officer, who is intrusted with the power of executing it, and that it should be accepted by the grantee named in it, or by some person authorized by him to receive it. In this respect it stands upon the same footing as deeds executed between private individuals. It is not necessary that a patent should be delivered to the grantee of the government, in order to vest a title in him, but it becomes operative for that purpose when it is issued. A tax deed can be regarded in no sense, as a patent. The distinction between them is obvious. A patent conveys the title of the government, and is under the hand of the chief executive officer, and the great seal of State; while a tax deed simply passes the owner's title, and is executed by the proper officer, under his own hand and private seal.³

4. The deed must recite the power under which it is made, otherwise it will be invalid. It does not derive its validity from its capacity as an independent conveyance, to transfer the estate described in it, but from the existence of the power, and a compli-

¹ *Watt v. Gilmore*, 2 Yeates R. 330; *Houston v. Foster*, 1 Watts R. 478.

² *McCoy v. Dickinson College*, 5 S. & R. 254.

³ *Hulick v. Scovil*, 4 Gilman R. 159; *Church v. Gilman*, 15 Wend. R. 658.

ance with the conditions prescribed by the creator of it. The title is derived from the power, and the conveyance must bear upon its face an acknowledgment of the power in pursuance of which it purports to have been executed. This rule is applicable alike to all powers, whether public or private in their nature.¹ The uniform practice throughout the country has been to conform to this rule. Every statute form of the deed not only recites the power under which it is executed, but usually recites a compliance with all of the requisitions of the statute by which the power was created. No instance can be found where a tax deed, or any other deed executed in pursuance of a public power, has been made in the form ordinarily in use among individuals in conveying land, and bearing no recognition upon its face of the power under which the officer acted.

5. Where the form of the deed has not been prescribed by law, but the statute simply authorizes the execution of a deed of conveyance to the purchaser, any deed, which, according to the rules of the common law, would be sufficient to transfer the title of the former owner, and vest the estate in the purchaser, is regarded as an operative mode of conveyance, provided it recites the power under which it was made, and is accompanied by proof that the law was strictly complied with.² But where the statute prescribes the particular form to be observed in the execution of the deed, that form becomes substance, and must be strictly pursued, or the deed will be

¹ 2 T. R. 241; *Jackson v. Roberts*, 11 Wend. R. 425; *Tolman v. Emerson*, 4 Pick. R. 160.

² *Chandler v. Spear*, 22 Vermont R. 388; *Brown v. Hutchinson*, 11 Ibid. 569; *Spear v. Ditty*, 8 Ibid. 419; *Bank of Utica v. Mersereau*, 3 Barb. C. R. 528.

held void.¹ In *Maxcy v. Clabaugh*,² where the statute form of the deed required a recital of the year for which the taxes were due, and the year was misrecited in the deed, it was held void. On the other hand, where the statute did not require the deed to state in what year the tax was assessed, for the non-payment of which the premises were sold, it was held valid.³ In the case last cited, which was an equity cause, it appeared that the statute of New York required the comptroller's deed to be executed "in the name of the people of the State;" and the deed offered in evidence did not purport to be so executed; but it was proven upon the hearing, that such had been the form used for twenty-five years. The deed was held valid. 1. Because the maxim "that custom is the best interpreter of the law," was

¹ *Chandler v. Spear*, 22 Vermont R. 388; *Kinney v. Beverly*, 2 Hen. & Munf. R. 341; *Smith v. Hileman*, 1 Scam. R. 323; *Atkins v. Kinman*, 20 Wend. R. 249; *Breese R.* 4; 15 Vermont R. 72; 22 Pick. R. 387; 11 Mass. R. 281; 1 East R. 64; 1 Cowper R. 32; 5 Gilm. R. 96.

² 1 Gilm. R. 26. The form of the tax deed prescribed by the Illinois statute of January 26, 1826, was as follows, to wit:

The auditor of public accounts of the State of Illinois, to all who shall see these presents, greeting: Know ye that whereas I did, on the _____ day of _____, at the town of Vandalia, in conformity with all the requisitions of the several acts in such case made and provided, expose to public sale, a certain tract of land, being (here insert the description of it,) for the sum of _____, being the amount of taxes for the year of (or years of, as the case may be,) with the interest, (if any,) and costs, chargeable on said tract of land; and whereas, at the time and place aforesaid, A. B. offered to pay the aforesaid sum of money for (the whole tract, or part thereof, as the case may be,) which was the least quantity bid for; and the said _____ has paid the said sum of _____ into the treasury of the State. I have granted, bargained and sold, and by these presents, as auditor of the aforesaid State, do grant, bargain, and sell (here describe the tract purchased,) to the said A. B., (or C. D., his assignee,) his heirs and assigns; to have and to hold the said tract of land, to the said _____ and his heirs, forever; subject, however, to all the rights of redemption provided for by law. In testimony of which, the said auditor has hereunto subscribed his name, and affixed his seal, this _____ day of _____, _____, Auditor. [SEAL.]

The form now in use in that State will be found *ante*, p. 232.

³ *Bank of Utica v. Mersereau*, 3 Barb. C. R. 528.

applicable in this case. 2. That the deed, though not technically executed in the name of the people, recited the statutes under which the sale was made, and a compliance with all of their requisitions, that the taxes were due to the State of New York, that the purchase money was paid into the treasury of the State, and the deed was executed by the comptroller of the State; and no one could doubt, upon an inspection of the deed, that it was the intention of the officer who made the conveyance, to convey the premises described in it, for and in behalf of the people of the State, and not as an individual acting in his own right; and, 3. That if the error in the form was a material one, it would not justify a court of equity in declaring that the purchaser had no right to the land by virtue of his purchase; but the comptroller, if necessary, would be compelled to execute a new deed in the proper form.

6. Where the date of a tax deed was left blank, the court presumed that it was executed and delivered prior to the passage of a statute which, it was contended, took away the power of the officer to make the deed. The date of the deed may be proved by parol, and in the absence of evidence, it will be presumed to have been made at the proper time.¹ This is in accordance with the general rule; the date is regarded as non-essential, the deed taking effect from its delivery, and when the date becomes material, in the course of a litigation, an omission may be supplied, or the deed contradicted where a wrong date is given, by extrinsic evidence. The law, however, will presume that a deed was delivered on the day of its date.²

¹ *Thompson v. Schuyler*, 2 Gilm. R. 271.

² 2 *Ld. Raym.* 1076; *Perkins* 120; *Touch.* 55; 1 *Cranch* R. 239; 4 *Com. Dig. Tit. Fait.* (B. 3.); 2 *Bl. Com.* 304; 2 *John. R.* 230; 4 *Ibid.* 230; 4 *East* R. 477; 1 *Bibb. R.* 619; 9 *Cowen* R. 255; 6 *Munf. R.* 555; 5 *John. R.* 139.

7. Where the statute is silent as to the acknowledgment of the deed, it is not essential to its validity. And where the statute expressly requires an acknowledgment, it is presumed that a tax deed will stand, in this respect, upon the same footing with ordinary conveyances, under the general laws; the rule in such cases is, that the execution of the deed may be proved in the mode prescribed by the common law, and when thus proven, it will be as valid and effectual as though it had been duly acknowledged. The acknowledgment only dispenses with common law proof of the execution of the deed.¹

8. Whether the tax deed must be recorded as against subsequent purchasers from the former owner, is a question upon which the authorities are divided. The affirmative is maintained in Vermont and Massachusetts,² while the contrary is the doctrine of the Illinois courts.³ This is an important question, and depends upon the fact, whether a tax title is a *derivative* or an *original* one. This subject will be fully discussed hereafter.⁴ It may, however, be laid down as a general rule, that where the statute, under which the proceeding takes place, in express terms requires the record of the tax deed, a compliance with it is as important as that of any other requisition of the law. The statute of Illinois declares, that "the deed so made by the collector, shall be acknowledged and *recorded in the same manner as other conveyances of real estate*, and shall vest in the grantee, his heirs or assigns, the title of the property therein described."⁵

¹ *Graves v. Bruen*, 1 Gilm. R. 167; *Thompson v. Schuyler*, 2 Ibid. 271; *Kennedy v. Dailey*, 6 Watts R. 269; *Hogins v. Brashears*, 8 Eng. R. 242.

² *Allen v. Everts*, 3 Vermont R. 10; *Tilson v. Thompson*, 10 Pick. R. 359.

³ *Graves v. Bruen*, 1 Gilm. R. 167.

⁴ *Post*, Chapter 37.

⁵ R. S. 1845, p. 447, Sec. 72.

9. It may be laid down as a general rule, that the officer on whom the power to convey is conferred, cannot execute a conveyance to the purchaser, until the expiration of the time limited by law for the redemption of the estate. There are no authorities upon this point; but the same rule of *strictness*, applied to the residue of the proceedings, is equally applicable to this; besides, the purchaser can acquire no right whatever to the estate, until the time of redemption has elapsed. A deed made prior to that time, would not only seem to be illegal, but a useless act, so far as the purchaser is concerned. It could not acquire any additional vitality from the fact, that the owner of the estate failed to redeem. The officer having no power to deliver the deed, nor the purchaser a right to accept it, before the expiration of the time fixed for redemption, the officer must, at the proper time, execute and deliver a new deed to the purchaser, or redeliver the old one. The date of the deed being immaterial, a redelivery of it, when the power to convey attached, would undoubtedly be sanctioned by the courts, and the deed treated as an operative conveyance. Where a married woman executes a deed, without the joinder of her husband, it is void to all intents and purposes, yet it is held that a redelivery of the deed, after the death of her husband, will pass the estate.¹ The statute of Illinois, which is undoubtedly similar in principle to that of every other State, will fully illustrate this doctrine. That statute provides that, "immediately after the expiration of the term of two years from the date of the sale of any land for taxes, under the provisions of this act, the sheriff shall make out a deed for

¹ Perkins 154; 1 Cowp. R. 201; 8 Cowen R. 277.

each lot or parcel of land sold, and remaining unredeemed, and deliver the same to the purchaser upon the return of the certificate of purchase.”¹ The statute gave, to owners laboring under no disabilities, two years from the date of the sale, to redeem.² It will be perceived that the language of the law does not empower the officer to convey, until the expiration of two years from the date of the sale.

10. The power to convey, when it once attaches, is a *continuing* one, and the exercise of it is not barred by lapse of time, except so far as the general statutes of limitation, which bar the right of entry upon the land, and the recovery of the possession of it by action, may effect the rule. The certificate of sale vests in the purchaser an equitable interest in the land, and he has a right to be clothed with the legal title at any time after the period of redemption has elapsed, and before his right is barred by the statute of limitation; and even afterwards, where the premises are not in the adverse possession of another. Probably in no instance can the officer refuse to convey upon the ground that the entry, or action, of the purchaser is barred; and upon *mandamus*, or bill in chancery, the adverse possessor, not being a necessary party to either form of action, the court would not in this collateral manner, decide whether the purchaser or adverse claimant had the better title. It has already been shown, that the repeal of the law under which the sale was made, does not divest the purchaser's right to a deed, and that a *mandamus* is an appropriate remedy to compel its execution and delivery. Under some circumstances, where numerous parties are interested in the question, and equity demands it,

¹ Sess. Laws 1838-9 p. 17, Sec. 42.

² Ibid. p. 16, Sec. 38.

a bill in chancery will doubtless be a concurrent remedy to compel the specific execution of the contract of purchase. But no case is conceived of where the latter remedy would be absolutely essential, to the protection of the rights of the purchaser. The officer delivers, and the purchaser accepts, the deed, without prejudice to the rights of the former owner, except where the proceedings have been strictly regular. Whether the deed is executed voluntarily or compulsorily, it binds no one but the parties to it, the act being purely ministerial. For these reasons, it is clear that no lapse of time will, as a general rule, extinguish the power of the officer to execute and deliver to the purchaser a deed for land purchased at a tax sale. Nor are authorities wanting upon this question. In *Graves v. Bruen*,¹ the sale was on January 10, 1833, the deed bore date January 2, 1840, and the title of the purchaser was sustained. In another case, the sale was made March 3, 1834, and the deed was executed March 8, 1838, (upwards of two years after the expiration of the time of redemption,) but this deed misrecited the year for which the taxes were due, for the non-payment of which the sale was made. In consequence of this mistake, a second deed was executed and delivered to the purchaser, November 10, 1841, reciting the said facts, and the last deed was held valid.² It will be perceived, that in this case, seven years and eight months intervened between the day of the sale and the date of the corrected deed. And in the *Bank of Utica v. Mersereau*,³ where many years had elapsed since the execution of the deed, which did not comply with the statute in point

¹ 1 Gilm. R. 167. ² *Mazzy v. Clabough*, 1 Gilm. R. 26. ³ 3 Barb. C. R. 528.

of form, the court intimated that the error might be corrected by bill in chancery.

11. Another important question, in connection with the deed, relates to the granting party. Where the statute authorizes a particular officer — *e. g.*, the auditor, sheriff, collector, treasurer, or county commissioners — to execute the deed, there can be no doubt of the validity of it, when executed by the officer who made the sale, provided his term of office has not expired at the time of the execution of the power. But the questions have been raised, whether the person who made the sale can execute a conveyance after the expiration of his term of office, or whether it must not be made by his successor, and also, as to the power of a deputy to make the deed. But all of these questions may be satisfactorily answered, as well upon principle as by the adjudged cases. The deed may be made by the successor, because it is an official act connected with the office, and not a personal trust reposed in the man who was the incumbent of the office at the time of the sale; besides, the record of the proceedings which constitute the basis of the exercise of this power, is, in legal contemplation, in the custody of the successor, they belong to the files of his office — his predecessor has no right to their possession.¹ It is equally true that the deed may be made by the person in office at the time of the sale, although his term has expired. The power to sell and convey land for the non-payment of taxes due upon it, is, in its nature, *entire*, and is analogous to sales made by sheriffs under execution, in which case the officer who sold may convey

¹ *Bestor v. Powell*, 2 Gilm. R. 119; *Maxcy v. Clabaugh*, 1 Ibid. 26.

after his term of office 'expires.¹ It is intimated, however, in *Graves v. Hayden*, that the officer who sells *must* make the conveyance, that his successor possesses no such power. Such is not the law. The power is vested in the officer, not the man. The facts by which the person is guided in the execution of the power can be ascertained only from the records and files of the office. The power of the person who made the sale to execute a conveyance, is an exception to the general rule, which requires the deed to be made by the person in office for the time being; and this exception depends upon two *fictions* of law for its support, viz., the *entirety* of the proceedings in selling the land of delinquents, and the doctrine of *relation*. This exception, *thus sustained*, proves the truth of the general rule, that the power of making the deed, is an *official* and not a *personal trust*. In the one case, there is *official and personal* responsibility to secure the due execution of the power; in the other, the *only* security of the parties interested in the act, is in the integrity of the person who performs it, and his liability to an action for a breach of duty. The power of a deputy to sell and convey lands, depends upon the power of his principal to make a deputy. The general rule is, that every *ministerial* office may be performed by deputy. The power of appointing a deputy is therefore *implied* in all such cases. Whatever power may be exercised by the principal may be performed by the deputy, and is equally valid in the one case as the other. But the deputy must act in the name of his principal. An acknowledgment of the deed in his own name is invalid. Nor has he

¹ *Graves v. Hayden*, 2 Litt. R. 64; *Elkin v. The People*, 3 Scam. R. 207; 4 Bibb R. 21.

power to execute, acknowledge and deliver a deed in pursuance of a sale made by the principal officer. It would be altogether irregular to permit the deputy to convey what had been sold by the principal, or the principal to convey what had been sold by the deputy. Permitting the sale of one to be completed by the conveyance of the other, leads to confusion. He who commences the execution of a power, must go on and complete it, except where a term of office has expired, in which case, either the late or present incumbent may exercise the power. No one can lawfully convey what has been sold by another, except in the case referred to, without the express power of the law, or the consent of the party in interest.¹

12. The next question in order is, to whom shall the deed be executed? The general rule is, that it must be made to the purchaser at the tax sale, unless the statute authorizes a transfer of the bid, or an assignment of the certificate of sale. It has been shown already, that the officer selling has no authority upon principle, to substitute the name of a third person for that of the successful bidder, even where the latter consents to it.² But upon common law principles, the certificate of sale is not assignable. The right of the purchaser, prior to the execution of the deed, is not only an *equitable* interest in the land, but that interest depends upon a *contingency* which may or may not happen; in such cases the law does not regard the interest as an assignable one. Besides, the nature of the right is not such as to be regarded as *alienable*, before the consummation of it by the delivery of the tax deed. The certificate confers upon the purchaser a simple right to demand and

¹ *Wilson v. Bell*, 7 Leigh R. 22.

² *Ante*, p. 326.

receive from the owner the redemption money. In this respect, it is a mere *chose in action*, which, in no case, is assignable but where expressly permitted by positive law. When the redemption is effected, no statute requires a reconveyance of the interest of the purchaser, to the owner. Upon the payment of the purchase money, the land becomes *ipso facto* discharged of the incumbrance. No interest in the land itself becomes *vested* in the purchaser, until the time for redeeming has expired. Until that period arrives, his interest is *contingent*. But between that time and the delivery of the deed, he has a *perfect equity*. Having purchased the land, paid the consideration, received a certificate of his purchase, and the owner having failed to redeem, if the law has been complied with in every respect, he is entitled to a deed, and may treat the transaction as an agreement to convey and demand a specific execution of it. Under these circumstances, courts of law—the ordinary forum of the party claiming under a tax sale—can take no notice of an assignment until the interest of the purchaser becomes absolute. But by statute, in many States, the certificate is assignable. When such is the case, the deed must be executed to the assignee, upon proving, to the satisfaction of the conveying officer, a valid assignment. By the statute of Illinois, the officer is authorized to convey to the purchaser or his *assignee*, but it does not prescribe what evidence shall be furnished to the officer, of the assignment. In *Wiley v. Bean*,¹ the supreme court decided that a tax deed, executed and delivered to the assignee of the purchaser, and reciting the assignment, was *prima facie* evidence of a regular assignment.

¹ 1 Gilm. R. 302.

The reason of this decision was, that whether the officer conveyed to the purchaser or his assignee, did not in the slightest degree affect the interest of the owner. This decision was not satisfactory to the entire bar. It was insisted that the assignment was an act *in pais*, which was essential to the validity of the assignee's title, and that he was as much bound to prove that fact as any matter of record upon which his title depended; that the statute did not declare the deed *prima facie* evidence of the assignment, and therefore the question ought to be determined according to the principle of the common law, which required a party who asserted the existence of a fact to prove it. The owner of the estate is directly interested in the question to this extent; he might be subjected to a double prosecution for *mesne* profits, where he was in possession of the land, and held over after the expiration of the time limited for a redemption, and the execution of the tax deed. If the person named in the deed as assignee, by fraud or otherwise, obtains the possession of the certificate of sale, and forges an assignment upon the back of it, and the deed is held *prima facie* evidence of the assignment, in an action brought by the pretended assignee against the former owner of the estate, and the latter having no means in his power of proving the negative, the consequence would be that a recovery of the land itself must take place, and the owner subjected to an action for the back rents and profits of the premises. It is evident that a judgment and satisfaction for the rents, would constitute no bar to a second action by the original purchaser; and in such action the *onus* would rest upon the former owner to prove that the assignment was *genuine*. The

recital in the deed would not be evidence against the purchaser. Why? Because he was not a party to the deed, and therefore not bound by anything contained in it. The same reason is equally applicable to the effect of the recital as against the original proprietor. He was no party to the deed. It was made against his will, perhaps without his knowledge, by a public officer acting as the agent of the law, with no power to bind any one by his acts, except so far as he conformed to the requirements of that law. A recital never estops strangers, nor are they evidence of the fact recited against any one save him who made them, unless expressly declared to be so by statute. Upon what principle then, can the recital bind the owner of the estate in the case put? It stands upon the same footing with the declaration of a stranger. It is *res inter alios acta*. The maxim is an important one—indeed the most important and practically useful of any rule of evidence—its effect is to prevent a litigant party from being concluded by the acts, conduct and declarations of strangers. On a principle of good faith and mutual convenience, a man's own acts are binding upon himself, and are, as well as his conduct and declarations, evidence against him; but it would be manifestly unjust, that a man should be bound by the acts of mere unauthorized strangers; and if a party ought not, upon principles of natural justice, to be bound by the acts of strangers, so neither ought their declarations, oral or written, to be used as evidence against him. It is upon this principle that a judgment is not binding upon the party against whom it was rendered, unless he had notice of the suit, and an opportunity of defense. Yet, according to the ruling in *Wiley v.*

Bean, the judgment of a mere *ministerial* officer, upon the fact of assignment, is held to be evidence against a stranger to the proceeding—where it may have the effect of concluding his rights, because of the difficulty of proving the *negative*. Because, therefore, the statute does not give the deed this effect as evidence, because it is contrary to the common law rule relative to the *onus* of proof, because it falls within the maxim, *res inter alios acta*, because it is not evidence against the alleged assignor, and because it may result injuriously to the original proprietor, it may be safely affirmed that the fact of assignment must be sustained by evidence *aliunde*. This doctrine seems to be conceded by the Supreme Court of the United States, in reference to patents issued to assignees of land warrants under the laws of Virginia.¹ The contrary was intimated in Ohio.² It is immaterial, however, which is the true rule in this class of cases, as the patent is matter of record, and ordinarily conclusive at law of every fact recited in it, where the government had title, and the officer of the law power to transfer it. It is very different with a tax deed, as has been shown already. The fact of assignment is easily proven. The deed is issued upon the surrender of the certificate, and the latter is usually preserved upon the files of some public office. Suppose a deed is made by persons styling themselves heirs or devisees of a deceased land owner, would it be pretended that this statement would dispense with the production of the will, or proof of the pedigree of the grantors? There is no difference, in principle, between the recitals of a tax deed, and those contained

¹ *Bouldin v. Massie*, 7 Whea. R. 122; *Clarke v. Graham*, 6 Ibid. 577.

² 2 Ohio R. 415.

in instruments of conveyance executed by private individuals. In concluding this subject, it is to be hoped, that when a decision is made affirming the doctrine in *Wiley v. Bean*, some *satisfactory* reason may be assigned for it. This is an age in which the courts, the bar and the people, demand *why* a rule is established; they are never satisfied with the *ipse dixit* of any judge.

13. Where a sale for taxes takes place during the lifetime of the owner of the estate, and he dies before the period of redemption expires, it is regular to execute and deliver the deed, notwithstanding the intervention of his death. In this class of cases, the conveyance is not made in the name of the proprietor, nor under any authority derived from him, but in the name of the State or the officer, in virtue of the authority with which the latter is invested by law. No principle is perceived whereby the death of the proprietor, between the time of the sale and the execution of the deed, can affect the power of the officer to convey, according to the requirements of the statute. There is no sort of analogy between the case in question, and a sale under execution, where the defendant dies prior to the sale. But where an execution is once levied in the lifetime of the defendant, the sale may proceed, and a conveyance may be executed in pursuance of it, notwithstanding the death of the defendant.¹

14. The Illinois statute² declares, that "whenever any person, either as original purchaser or assignee, is entitled to deeds for more than one tract of land, under the same sale, he shall have the right to require the sheriff to include all the said tracts, or as many

¹ *Curry v. Fowler*, 3 A. K. Mar. R. 504.

² Laws 1842-3, p. 238, Sec. 3.

thereof, as he may designate in one deed." This provision "is a salutary one," says Chief Justice Treat, "it avoids the inconvenience of having numerous conveyances to real estate, situated in the same county, the title to which originates in a common source. It also dispenses with the unnecessary expense of the sheriff and recorder, in the execution and recording."¹

15. A tax deed, which upon its face, bears evidence of a non-compliance with a substantial requisition of the law, is a nullity.²

16. The deed must give a certain description of the land conveyed, and conform, in every respect, to the mode of designation, pointed out by the local law of the State where it is executed, and of course, conform to the description adopted in the anterior proceedings. The decisions heretofore cited, in reference to the degree of certainty required in describing the land in the list, advertisement, judgment, precept, and other documents, are equally applicable to the description contained in the deed. It only remains to state the cases which have been decided, relative to descriptions in the deed itself. In *Tallman v. White*,³ the addition of a false particular in the description, which, in a deed between private individuals, might be rejected as surplusage, where the description without it would be certain, will vitiate a tax deed. The facts of this case have been stated already.⁴ This description, viz.: "one hundred and forty acres of land, in the Whitaker Reserve, in T. 5, R. 15," a tract of land containing one thousand two hundred and eighty acres, and known by the name indicated, was held void.⁵ A grant by the owner of

¹ *Silliman v. Frye*, 1 Gilm. R. 664.

² *Moore v. Brown*, 4 McLean R. 211; S. C., 11 Howard U. S. R. 414; *Farrar v. Eastman*, 1 Fairf. R. 191; *Hogins v. Brashears*, 8 Eng. R. 242.

³ 2 Comst. R. 66. ⁴ *Ante*, 154. ⁵ *Burchard v. Hubbard*, 11 Ohio R. 316.

a specified number of acres, in a particular tract, would undoubtedly confer a right of election upon the grantee, and authorize him to locate the quantity in any part of the tract he saw proper to elect, and this upon the principle, that a conveyance must be held to pass some interest, if such effect may be given to it, consistently with the rules of law, and that if uncertain or ambiguous, it must be construed most strongly against the grantor. The most striking illustration of this rule is to be found in the case of *Doe ex. dem. Webb v. Dixon*,¹ where a lease for "seven, fourteen or twenty-one years," was held to be a lease for the latter term. Upon this ground, if A. conveys to B. fifty acres out of a particular tract, without describing it by metes and bounds, or some other certain description, the grantee would have the right to elect in what particular part of the tract he would take it; the location, when once made, would be conclusive upon the grantor; and an exclusive possession by the grantee, of that number of acres, would be evidence of his election. But in this respect there is a wide difference between the conveyance of the owner and a public officer. The latter is a mere instrument to pass the title. The former may sell upon his own terms, and may confer a right of election upon his grantee; and if no such right is granted in express terms, the law will imply it, in order to effectuate the grant. But power to grant such a right is not conferred upon the officer of the law. It is not only unnecessary to the objects to be effected by a tax sale, but would be destructive of the interests of the owner, if tolerated. The purchaser, for instance, by locating the quantity so as to include a mine, a spring, a water power, or a dwelling and curtilage, might

¹ 9 East R. 15.

render the residue of no value to the owner, and thus produce a sacrifice of the property. In most statutes a power is conferred upon the officer to sell a part of the land upon which the tax was due; this was intended for the benefit of the owner; but a power to sell a part, with the right of election, as to the location of it, would be *ruinous* to him.¹

17. Ordinarily, a tax deed takes effect and becomes operative as a conveyance, at the time of its delivery by the officer and acceptance by the grantee, and not before.² But the question, whether the doctrine of *relation* can have any application to such a title, is an interesting one. The general rule of law is, "that, where there are divers acts concurrent, to make a conveyance, estate or thing, the *original* act shall be preferred, and to this, the other acts shall have relation." This rule is based upon a legal fiction, or assumption, that a thing is true which is either not true, or which is as probably false as true. It is applied only where it is absolutely necessary, in order to advance the justice of a cause — to enforce a right or prevent a wrong. In all cases its application must be consistent with the principles of natural justice. The rule on this subject being that a court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work a wrong contrary to the real truth and substance of the thing. No fiction shall therefore extend to the injury of a party, its proper operation being to prevent a mischief, or remedy an inconvenience which might result from a general rule of law. And whenever the rights of a third person will be injuriously affected by the application of the doctrine, courts invariably refuse to be

¹ *Erwin v. Helm*, 13 S. & R. 151.

² *Hulick v. Scovill*, 4 Gilm. R. 159.

governed by it.¹ The fiction has been applied in this wise: A term of court is regarded as one day in law, and every act of the court has relation to that day.² An execution relates to the judgment.³ Possession under a writ of *habere facias*, issued upon a judgment in ejectment, relates to the time of the commencement of the action.⁴ A patent relates from the delivery to the date of the patent, and from the date when necessary to the entry or location of the land.⁵ A deed, based upon an agreement to convey, relates to the date of the latter.⁶ The acknowledgment of a deed relates to the time when it was delivered,⁷ and so of the registration of it.⁸ An escrow relates to the first delivery.⁹ A deed made in pursuance of a power relates to the date of the power.¹⁰ The enrollment of a bargain and sale, under the English statute, relates to the date of the deed.¹¹ A copyhold estate relates from the admittance to the surrender.¹² And livery of seizin relates to the delivery of the deed of feoffment.¹³ A sheriff's deed relates to the time when the right of redeeming the estate expired,¹⁴ and to the time when the judgment became a lien upon the land for the purpose of protecting the rights of the purchaser against intervening interests.¹⁵ A confirmation by a board of land commissioners, organized under a

¹ Broom's Legal Maxims, 90.

² 1 T. R. 279; 7 Ibid. 21; 3 Burr. R. 1596; 1 Wils. R. 39; 2 Gilm. R. 119.

³ *Shelly's Case*, cited 3 East R. 444.

⁴ 2 Dana R. 32; 4 Cowen R. 329.

⁵ 3 Caines R. 62; 2 John. R. 80; 12 Ibid. 140.

⁶ 1 John. Ca. 81; 2 Caines Ca. 301; 2 John. R. 510; 4 Ibid. 230, 534.

⁷ 8 Ham. R. 87; 1 Cranch R. 239.

⁸ 7 Mass. R. 381.

⁹ 1 John. Ch. R. 288; 1 John. Ca. 81; 18 John. R. 544; 13 Ibid. 285.

¹⁰ 20 John. R. 537.

¹¹ Burr. R. 2787.

¹² Ibid.

¹³ Ibid.

¹⁴ 3 Gilm. R. 365; 9 Missouri R. 524; 12 Ibid. 146; 11 Ohio R. 235; 3 Caines R. 262; 2 Wend. R. 507; 7 Cowen R. 540; 13 John. R. 340; 20 Ibid. 537; 1 Hill R. 107; 15 John. R. 309; 3 Cowen R. 75; 4 John. R. 234.

¹⁵ *Fell v. Price*, 3 Gilm. R. 190.

special act of Congress, relates to the time the claim was filed before them.¹ These cases sufficiently illustrate the general rule of law in regard to the doctrine of relation. The practical operation of the rule is to defeat an adverse possession, to avoid intermediate rights, to enable the party claiming an estate, to sustain actions for injuries done to the inheritance, and in general, to protect those rights of his, which attached at the time the act took place, to which the consummating act of title has relation. It has been regarded as questionable whether this principle, or rather fiction, has any application to tax titles. The only reason assigned why it has not, is, that this class of titles being *stricti juris*, are regarded as a kind of outlaw — beyond the pale of common sense, and the general principles of law which were originally intended to further justice, and protect the rights of parties litigant in courts of law and equity. This view of the subject deserves but little consideration. Where the statute, under which the sale takes place, is silent upon any point which may be objected against the right of the purchaser, it is the duty of the court to resort to those principles of the common law which control in analogous cases. Indeed, the common law is the only recourse where the statute is silent. There is more necessity for resorting to the fiction of relation in tax titles than in any other class of cases. Their validity depends upon a *series of acts*, each of which is intimately connected with the other, and the whole combined constitute an *entire* proceeding. The assessment is the foundation, and every subsequent act, particularly those in which the State and the purchaser have an interest, must of necessity relate to the prin-

¹ 10 Howard R. 372.

cial act. There are but two cases which discuss this question. In *Ferguson v. Miles*,¹ which was an action of ejectment, the plaintiff claimed title under a sheriff's sale made August 8, 1843, based upon a judgment and execution in favor of David B. Hill and against George Morton, and in order to prove title in the latter, the plaintiff offered in evidence a judgment against the land for the taxes of 1840, rendered April 15, 1841, a precept issued thereon, dated April 24, 1841, the register of sales showing a sale to Morton on April 29, 1841, and a deed from the collector to Morton, dated May 11, 1843. The defense proved that the tax deed was executed at the instance of Hill, the judgment creditor, and delivered to him, that the certificate of purchase was not surrendered at the time of the execution of the deed, nor was the deed made with the knowledge or assent of Morton, and that on June 20, 1844, a second deed was made and delivered to the agent of Morton, conveying the estate to Morton, in pursuance of the tax sale. Upon this state of facts the circuit court excluded the tax deed of May 11, 1843. The plaintiff then offered to read the tax deed of June 20, 1844, as evidence of title in Morton, the judgment debtor, but it was rejected. Thereupon the plaintiff prosecuted a writ of error. The supreme court held the first deed inadmissible, because it was never delivered to and accepted by the grantee; but that the second deed was competent evidence of title in Morton, at the date of the sheriff's sale, because two years had elapsed within which the former owner was entitled to redeem, and that the deed of June 20, 1844, related back to the period of time when that right of

¹ 3 Gilm. R. 358.

redemption expired. The judgment was accordingly reversed, and the cause remanded for further proceedings. This case, it will be perceived, decides simply, that the interest of a purchaser at a tax sale, after the period allowed for a redemption has expired, and before the execution and delivery of the tax deed, may be sold under an execution, and that a deed afterwards made, will relate back to the time when the judgment debtor became entitled to a conveyance, and that the title thus acquired, will enure to the benefit of the purchaser, at the sheriff's sale.

In *Donahoe v. Veal*,¹ the action was trespass *q. c. f.* to recover treble damages under the statute of Missouri, for cutting timber upon land claimed by the plaintiff. To support his title to the land, the plaintiff proved a sale of the land for taxes, in June, 1848, to Thomas Donahoe, a deed from Thomas Donahoe to him for the premises purchased at the tax sale, bearing date April 18, 1849, a tax deed to Thomas Donahoe, dated February 10, 1851, and proved the trespass to have been committed by the defendant after the tax sale, and execution of the deed from the purchaser, at that sale, to the plaintiff, but before the execution of the tax deed. The material provisions of the statute which governed the rights of the plaintiff, were that upon the sale, the officer should execute and deliver to the purchaser a certificate of the sale, that the owner might redeem within two years from the date of the sale, and that if he failed to do so, the officer who made the sale should convey to the purchaser. The statute of 1845 made the deed *prima facie* evidence of title, upon proof by the party claiming under it, that the requisitions of the law had been

¹ 19 Missouri R. 331.

complied with; while the act of 1847 made the deed evidence *per se*, and cast the *onus probandi* upon the former owner in order to defeat it. The court held that the plaintiff was not entitled to recover, and Judge Gamble, in commenting upon the two statutes declaring the legal effect of the deed, and upon the rights of the purchaser at a tax sale made under them, remarked: "The two acts, while they differ, in putting the *onus* upon different parties, do not, in the necessity of a compliance with all the requirements of law which are to be observed before the execution of the deed. *The principle still remains untouched, that a person claiming to hold land under a sale for taxes, can only maintain his title when the law has been strictly pursued.* It is to be observed, that in neither of these acts is there any intimation that the deed is to afford any evidence of title in the purchaser, *prior to its date.* In the absence of any such provision, the deed can have no such effect, unless the previous proceedings contemplated the passing of the title to the purchaser before the time appointed for making the deed. If the law did not propose to give the purchaser the title to the land, until two years should elapse from the time of the purchase, then it did mean that the title should remain in the owner for that period, and the right of the purchaser was, to receive his redemption money, with a high penal interest during the delay of redemption. It appears very clearly to be the design of these two acts, that the title to the property sold for taxes shall remain undisturbed until the deed is actually executed by the register, and that until that act is performed, the title is in the former owner. Such being the design of the acts, *the doctrine of relation cannot be applied to such deed, to give it an effect and operation*

contrary to the meaning of the law, by allowing the person claiming under it, to maintain, not only actions of trespass for injuries done after the sale, and before the conveyance by the register, but actions for the rents, issues and profits accruing during that period. The whole scheme of these acts very plainly shows, that such a construction, or application of the fiction of relation to such a case, would be contrary to the intention of the legislature." The Illinois and Missouri cases are in direct conflict with each other. The former admits a relation to the time when the right of redemption expires, the latter denies the operation of the fiction altogether. The reasoning in *Donahoe v. Veal* is not satisfactory. The fact that the statute makes the deed, and not the certificate of sale, *prima facie* evidence of title, cannot affect the question. When the right of redemption expires, the title of the owner is completely divested, and the purchaser becomes seized of an indefeasible estate of inheritance. True, his title is an equitable one, but he has a right at any moment, to demand a deed, by which he will become clothed with the legal title. Prior to the delivery of the tax deed, the estate must reside in some one — it cannot be regarded as in abeyance — and some one must have a right of action for any injury to it. The former owner cannot sustain an action in such case — because his title is gone. Unless the purchaser may sue, the trespasser must go unpunished. It is therefore equitable that by means of the doctrine of relation, the purchaser should be permitted to maintain an action of trespass for an injury to the inheritance intermediate the time when the right of the owner to redeem expires, and the execution and delivery of the tax deed. It has been decided

that a party to an ejectment suit cannot read, as evidence of title, a tax deed executed and delivered after the demise in the declaration.¹

18. The question sometimes arises whether a power to sell land for the non-payment of taxes, confers, by implication, the power to execute a deed to the purchaser. Ordinarily, a power of sale carries along with it the authority to execute and deliver to the purchaser the usual instrument of conveyance. It is a general rule, that every grant of power necessarily carries with it all the usual, ordinary and necessary means for the exercise of that power. And in the case of a power of sale, it would seem reasonable that this principle should apply. The sale is the *substantial*, and the conveyance the *formal*, part of the transaction. In cases of private agency, it is difficult to perceive why the agent cannot convey, as well as sell, under a power to do the latter. If the owner of the estate can trust his agent to fix the terms of sale, the law may surely sanction his act in conveying the land, where but little discretion is necessary, compared with that to be exercised in the sale upon which it is based. This doctrine has been applied to tax sales in Maine and Illinois,² but it is most emphatically repudiated in Indiana and Michigan.³ In *Doe v. Chunn*, which presented the question whether a municipal corporation, having simply a power to sell land for taxes, could, after a sale, make a deed to the purchaser, the power was denied, because, 1. The power was in derogation of the common law; 2. A corporation can exercise no implied powers; and 3. The power to sell did not imply the power to convey,

¹ *Pitkin v. Yaw*, 13 Illinois R. 251.

² *Farrar v. Eastman*, 5 Greenl. R. 345; *Bruce v. Schuyler*, 4 Gilm. R. 273-4.

³ *Doe v. Chunn*, 1 Blackf. R. 336-8; *Sibley v. Smith*, 2 Mich. (Gibbs) R. 490.

because the *general law*, authorizing proceedings against delinquents, treated the sale and conveyance as separate and independent acts. The question was put to the court, how is the purchaser to obtain his right? to which it was replied, "The method is not pointed out by legislative authority; it is a case not provided for in the statute, and a court of law cannot supply the defect." And in *Sibley v. Smith*, the power of the auditor of State to convey lands sold by him for taxes, was denied upon similar grounds. These decisions appear extremely unjust and contrary to law and reason. Can it be supposed for an instant that the legislature ever intended to authorize the sale of a tract of land, receive the purchase money, and then refuse to clothe the purchaser with the title to it? The idea seems absurd. The purchaser can buy the land, but acquire no title to it—he may pay his money to the State, and yet receive no value for it. A court of equity cannot aid him, because that court has no more power to supply a *casus omissus* in a statute than a court of law possesses. If courts were as astute in supplying such a defect, as they are occasionally, in getting rid of the positive requirements of a statute, it is presumed they would be able to sustain a conveyance made under such circumstances, by unanswerable arguments.¹

¹ The statute of Arkansas prescribed the form of the tax deed, which contained many recitals, and among others, the day of sale and the person by whom it was made, and declared the deed conclusive evidence of title in the purchaser; and it was held in *Hogins v. Brashears*, (8 English R. 242,) that where the deed, in its recitals, showed that the sale was made on the wrong day, and by an ex-collector, after the expiration of his term of office, it was void upon its face, and conveyed no title to the purchaser.

CHAPTER XXIII.

OF VARIANCES BETWEEN DIFFERENT DOCUMENTS AND RECORDS
RELATING TO THE PROCEEDINGS.

THE validity of a tax title depending upon the regularity of all the proceedings, each document or record, in the series of acts necessary to the consummation of the title, must not only be legal on its face, but correspond with the preceding one upon which it is based, in all essential particulars. The proceedings are, in one sense, an *entirety*, and must be consistent throughout. This is requisite, not only with a view to the legal identification of the document or record, but the power of sale and conveyance in a great measure depends upon such consistency. The assessment is the incipient act in the acquisition of title, and all of the subsequent proceedings are based upon it; each act in the series must, therefore, not only conform to the assessment, but correspond with its own immediate antecedent, in every thing which is essential to its legal identity. Any material and substantial variance between the document or record in question, and those which preceded it in point of time, is fatal to its validity; while trifling errors and omissions in matters of form, which do not affect the power of the officer, nor destroy the identity

of the document or record as a part of the entire proceedings, may be disregarded.¹ This is the only true rule to adopt. When it is considered, that all human affairs and dealings are connected together by innumerable links and circumstances, forming one vast context, without any chasm or interruption, and undistinguished by the *artificial* boundaries and definitions of right and wrong prescribed by the law, it is, in the nature of things, impossible that a transaction, detailed in records and documents, can be identical with the facts which actually transpired, if the record or document relied upon as proof, vary from the facts in the slightest particular, be the variance, in its own nature, ever so insignificant. It is easy, therefore, to see, that to require this, as it were, natural and absolute identity between the fact and the proof, in all matters of detail and form, would be, at the least, highly inconvenient, if not wholly impracticable. Hence it is, that an artificial and *legal identity*, as contradistinguished from a *natural identity*, must be resorted to as the proper test of variance between different parts of an entire transaction.² This is the philosophical ground upon which the doctrine of variance, between the pleadings and evidence in a cause, is based. There the strict rule is, that the allegations and proofs must correspond. A party cannot be permitted to allege upon the record, one cause of action or ground of defense, and prove another, because it would operate as a surprise upon the adverse party. But this rule is modified by another, that it is sufficient to prove the *substance of the issue*. In relation to written instruments, the rule is probably more strict. There, every

¹ *Pulkin v. Yaw*, 13 Ill. R. 251.

² *Starkie's Ev.* part 4, pp. 1526-7.

descriptive averment must be strictly proven; but this rule, too, is qualified by the doctrine of *idem sonans*, *surplusage*, and *immateriality*. The principle to be extracted from the rules of pleading and evidence, in relation to variances is, that the *legal identity* of the instrument in question is the only test. The rule and the reasons upon which it is founded are equally applicable to variances between different documents relating to the sale of land for taxes. But on the other hand, where the variance affects the question of power, or destroys the legal identity of the document or record, it furnishes a decisive objection to a title derived under it. Many such variances have been noticed in the preceding chapters. In *Fitch v. Casey*,¹ the land against which the proceeding was had, was a town lot, sixty feet front by one hundred and forty deep. The west fifth of the lot was assessed, the west two-fifths were returned as delinquent, the west third was advertised for sale, the west two-fifths sold, and the tax deed conveyed the west two-fifths. The sale was held void. Kinney, J.: "These variances we think sufficient to vitiate the entire sale, and defeat the collector's deed. The objections are of a serious character, and the evidence shows a manifest violation of some of the most important provisions of the statute. Two-fifths of the lot were sold and a deed made, when but one-fifth was assessed for taxes. The officer sold a part on which no tax was levied, and therefore on it no tax incumbrance existed. The west third only was advertised, and yet the west two-fifths were sold. A portion of the lot was sold, without the previous notice required by the statute having been given. These discrepancies

¹ 2 G. Greene R. 300.

and omissions are fatal to the validity of the sale, and hence no title passed to the purchaser." In Indiana, a variance in the description of the land, between the delinquent list and the judgment, was held fatal.¹

In *Smith v. Bodfish*,² the deed recited the levy of a tax of one cent and four mills per acre on a township containing 23.414§ acres, amounting to \$923,00. The record of the county commissioners showed a tax of eight cents and two mills per acre, amounting to \$1,920,00. In the absence of any explanation, the sale was held void, because of the variance in the amount of the tax. The court remarked, that if the aggregate amount of the tax due upon the land had been reduced from the amount named in the levy to that recited in the deed, by a portion of the owners of the township paying their share of the tax, which was probably the case, this fact should have been recited in the deed, or proved by the party claiming under the tax sale. Where the land was listed and assessed in the name of *Allan Gillespie and James Gaily*, and advertised as the property of *Charles Gillespie*, the variance was held fatal.³ Under the act of Congress authorizing a sale of the land of delinquent tax payers, a parcel of land was listed in the name of *John Hood*, and described as a tract containing 30,000 acres; the deed recited a sale of, and conveyed, 30,000 acres. It appeared, however, that *Hood* was the owner by patent of a 15,000 acre tract alone. The court held the sale void upon the ground of the variance in the quantity, but intimated an opinion, that if the parcel of land was identified by

¹ *Smith v. State*, 5 Blackf. R. 65.

² 27 Maine R. 289.

³ *Watt v. Gilmore*, 2 Yeates R. 330.

oral evidence, the sale might be sustained.¹ Where the judgment is against *eight* lots, and the deed recites a sale of two *only*, the variance renders the sale void.² The judgment must be treated as void, or else the eight lots regarded as an entire tract, and sold accordingly. The proceeding must have some consistency about it. The same doctrine was maintained in Ohio, where nine lots were assessed together, and each were sold and conveyed separately.³ So where the tax judgment is for ninety-nine cents, and the precept recites a judgment for one dollar and twenty-five cents, the variance is material and fatal.⁴

¹ *Hood v. Mathers*, 2 A. K. Marshall R. 556.

² *Pitkin v. Yaw*, 13 Illinois R. 251.

³ *Wiley v. Scoville*, 9 Ohio R. 43.

⁴ *Pitkin v. Yaw*, 13 Illinois R. 251.

CHAPTER XXIV.

OF SALES ACTUALLY AND CONSTRUCTIVELY FRAUDULENT.

It has been already remarked, that the validity of a tax sale depends, not only upon the authority of the officer to sell, but on the *fairness* of the transaction. The maxim is, that fraud vitiates everything. Contracts of whatsoever dignity, if tainted with fraud, are void at law and in equity. By it, the most solemn proceedings of courts of justice are avoided. And we are informed by high authority, that even an act of parliament, conceived in fraud, may be declared a nullity. There is nothing in the nature of tax sales, which exempts them from the operation of this general maxim. On the contrary, a more rigid scrutiny into their fairness is demanded, because of the gross inadequacy of the price usually paid at such sales, and the great inducements held out for the perpetration of fraud in the conduct of them. Positive fraud occasionally infects these sales. Instances have occurred where the collector and purchaser have combined to defraud the owner by a sale and division of the spoil, where the taxes were in fact paid by the owner. Also, where an agent entrusted with funds to pay the taxes, violated his trust, and by a similar arrangement with the purchaser, permitted a

sale. These, and positive frauds of a similar character, of course render the sale void.

Though positive frauds sometimes occur, the most numerous kind are those usually denominated *constructive*; or that class of frauds which may be inferred from the violation of public or private confidence; from the privity of the purchaser with the title sought to be divested, or on account of their being contrary to public policy. Such sales are void, not so much because they are opposed to the *letter*, as to the *spirit* of the revenue laws, and the principles of good faith which the common law exacts in transactions of this nature. A partnership or contract formed for the purchase of land at tax sales, is against the policy of the law; and if such contract be entered into for the express purpose of making such purchases, it is a fraud on the owner of the property, and the purchaser acquires no title. The case of *Dudley et al. v. Little et al.*,¹ is a strong authority in support of this position. The question arose upon a bill in chancery, in which the complainants alleged that they were the heirs of Israel Ludlow, and as such, the owners of the land in controversy; that 370 acres of this land, of the value of three dollars per acre, were purchased by the defendant for \$33,73. The bill then charged that a fraudulent combination had been formed between the defendant and sundry other persons, to purchase large tracts of land at said sale, for the purpose of speculation; that it had been agreed between the defendant and those who were to participate in the profits of the speculation, that the defendant alone should bid at the sale; that the other partners in the contract should advance their respective portions of

¹ 2 Hammond R. 504.

the purchase moneys, and receive their share of the profits; and that in pursuance of such fraudulent contracts, the defendant purchased the complainants' land, and obtained a deed therefor. The prayer of the bill was to set aside the tax deed, etc. To this bill a demurrer was interposed, which was overruled, and a decree entered according to the prayer of the bill. In the opinion, the court say: "Such combinations have, necessarily, a direct tendency to prevent competition, which it is the duty of the legislature and the policy of the law to encourage. Over a sale of this description the owner has no control; he cannot refuse a bid, or adjourn the sale, or fix a sum below which the property shall not be struck off. The sale is managed by the agent of the State. The owner is not consulted. The highest bidder becomes the purchaser, although the sum bid be less than a hundredth part of the value of the property. This being the case, any combination which has a tendency to reduce the price of the property, by preventing competition, must operate as a fraud upon the owner. The effects of such combinations cannot be controlled by any vigilance on the part of the owner. It frequently happens that large quantities of land are offered for sale on these occasions, in the absence and without the knowledge of the owner; and if such combinations are permitted, all the persons present at the sale might form themselves into companies, and, by an agreement not to bid against each other, might purchase in the whole of every tract offered for the amount of tax due upon it. We do not mean to say that partners cannot purchase property at a tax sale, for the convenience of the business they are engaged in, when speculation is not their object; but

that a partnership or combination cannot legally be formed for the purpose of making such purchases." Upon the same principle, any agreement or understanding between two or more bidders at such sales, that one of them only shall bid upon a particular tract of land, if carried into execution, is void, whether the parties to the combination are to share the profits or not; because its direct effect is to diminish competition. A custom exists in some of the western States, among the regular attendants upon sales of this character, that no one of them shall bid in competition with another, who alleges that he has a *claim* upon the land offered for sale. By *claim* is understood any colorable or defective title to the whole or any portion of the land put up. Such customs are clearly void, and if acted upon, render the sale illegal. It is a well settled principle, that all agreements whereby parties engage not to bid against each other at judicial or statutory sales, are void. They are unconscientious, against public policy, have a tendency to affect injuriously the character of sales at public auction, and to mislead private confidence. They operate virtually as a fraud upon the owners of the property. This principle has been applied to judicial sales under judgments, decrees and orders, to sales made by persons acting under a power conferred by a special statute, and to those made by public officers under the authority delegated to them by the public laws of the land.¹ The propriety of its application to tax sales has never been questioned, and the Ohio case is an unanswerable argument in its favor. So, if underbidders or puffers are employed at the sale, to enhance the price and deceive other bidders, and

¹ 1 Story's Eq., Sec. 293.

they are, in fact misled, the sale will be held void as against public policy.¹

There is still another class of frauds proper to be noticed, such as purchases made by those who are bound by covenant, or upon legal or equitable principles, to pay the taxes, and yet suffer the land to go to sale for the purpose of acquiring a title against the owner, under whom they claim the possession, or to whose title they are in some manner privy.² The adjudged cases fully and clearly illustrate the extent of this rule. A mortgagor in possession, who has conveyed with warranty, is bound to pay the taxes, and prevent a sale of the estate; and if he acquires a tax title, it inures to the benefit of the mortgagee.³ So where the mortgagor conveys the estate in pledge by simple quit claim. Nor can the mortgagee acquire any title at a tax sale, whereby the mortgagor may become barred of his equity of redemption, whether he is in or out of possession. The person in whose name the land was listed and assessed for taxation, can acquire no additional title by purchasing it at the sale.⁴ So the purchaser at a tax sale, of land in which he has an interest as heir, acquires no additional title.⁵ One in possession of a tract of land at the date of the assessment, may purchase at the sale, unless it appears that he was bound to pay the taxes, in which event he can acquire no title by his purchase.

¹ Story's Eq., Sec. 293.

² *Blake v. Howe*, 1 Aiken R. 306; *Willard v. Strong*, 14 Vermont R. 532.

³ *Fuller v. Hogdon*, 25 Maine R. 243; *Gardiner v. Gerrish*, 23 Ibid. 46; *Frye v. Bank of Illinois*, 11 Illinois R. 367; *Combs v. Warren*, 34 Maine R. 89; *Williams v. Hilton*, 35 Ibid. 547; *Faure v. Winans*, Hopkins R. 283.

⁴ *Douglas v. Dangerfield*, 10 Ohio R. 152; *Ballance v. Forsythe*, 13 Howard U. S. R. 18; *Voris v. Thomas*, 12 Illinois R. 442; *Glancy v. Elliott*, 14 Illinois R. 456; *Chambers v. Wilson*, 2 Watts R. 495.

⁵ *Piatt v. St. Clair's heirs*, 6 Ohio R. 93; *Choteau v. Jones*, 11 Illinois R. 322.

In *Blakeley v. Bestor*,¹ the defendant set up an outstanding tax title, and it appeared that he was in possession of the land at the time of the assessment and sale, and the court refused to presume that he was bound to pay the taxes: "It is insisted that the defendant is not in a position to avail himself of an outstanding tax title, be it ever so regular, for the reason that he is shown by the record to have been in the possession of the premises at the time the taxes accrued, and the sale took place, wherefore it is said it was his duty to have paid the taxes, and that he ought not to be permitted to avail himself of a tax title acquired through his default. This may or may not be so. *It does not necessarily follow that because a person is in possession of premises, he is bound to pay the taxes assessed upon them.* He may occupy them as a tenant, under an agreement that his landlord shall pay the taxes, and in such case there could be no obligation on the tenant to pay them, particularly if, in pursuance of the agreement, they were listed for taxation in the landlord's name. Supposing the tax title to have been regular, the defendant has the right, *prima facie*, to introduce it in evidence. When introduced, it would be competent for the plaintiff to avoid it, by proving that the defendant occupied a position, while it was maturing, which made it his duty to have paid the taxes, and which forbids his taking advantage of a title acquired through his default. This proof, the person seeking to avail himself of the tax title, should have an opportunity to rebut or explain by other evidence." A vendee cannot acquire a title adverse to his vendor, by the

¹ 13 Illinois R. 708.

purchase of the land at a tax sale.¹ Nor can an agent, whose duty it is to pay the taxes, become the purchaser of his principal's land at such a sale.² Nor can one tenant in common in such case, acquire a title in exclusion of the rights of his cotenants.³ But after the tax title has matured in the hands of a stranger, it is said that one tenant in common may purchase and hold adversely to his cotenants.⁴ Nor can a tenant for life purchase and hold adversely to the remainder man or reversioner. It is the duty of the tenant for life to cause all taxes assessed upon the estate during his tenancy to be paid; and if he neglects it, and thereby subjects the land to be sold to pay such taxes, and purchases it in himself, or suffers a stranger to purchase, and then procures a release to himself, he can acquire no right to the estate against the owner in fee.⁵ But in *Branson v. Yancey et al.*,⁶ which was a bill in chancery by the purchaser at an execution sale, against Yancey's heirs, to set aside a tax deed, executed and delivered to the widow of Yancey, and subject the land to the payment of their debts, it was held by the court that "a widow, who, after the death of her husband occupies his residence, his children, some of them of age, living with her, is under no obligation to pay the tax *accruing* thereon *between* his death and the assignment of her dower. Therefore, a purchase by her of the premises for such taxes made after the assignment of dower, without actual fraud, will not be set aside in favor of her husband's

¹ *Voris v. Thomas*, 12 Illinois R. 442; *Glancy v. Elliott*, 14 Illinois R. 456.

² *Oldhams v. Jones*, 5 B. Mon. R. 458; *Matthews v. Light*, 32 Maine R. 305; *Bartholomew v. Leech*, 7 Watts R. 472.

³ *Lewis v. Robinson*, 10 Watts R. 354; *Williams v. Gray*, 3 Greenl. R. 207.

⁴ *Kirkpatrick v. Mathiot*, 4 W. & S. 251.

⁵ *Varny v. Stevens*, 22 Maine R. 331.

⁶ 1 Dev. Eq. R. 77.

creditors." Henderson, J., dissented, saying: "It was the duty of the occupant to keep down incumbrances, and any acquisition of title made by her, growing out of her omission, is for the benefit of all concerned." In *Woodburn v. Farmers' and Mechanics' Bank*,¹ where one became the judgment creditor of another, and after the judgment became a lien on the land in question, the premises were sold for taxes, upon an assessment against the judgment debtor, and the creditor purchased in the property at the tax sale; and afterwards caused an execution to be issued upon his judgment, and permitted a stranger to purchase the property at the execution sale, without informing him of his tax title, it was held that the conduct of the judgment creditor was a fraud upon the execution purchaser, and that the latter was entitled to the land.

It seems to be a debatable question whether the officer intrusted with the power of sale may purchase the land. This question fairly arose in *Chesnut v. Marsh*,² was discussed by the counsel, but not decided by the court. There, the clerk of the county commissioners' court, who was required by law to assist the sheriff in making the sale, whose duty it was to keep a register of the sale, to execute certificates of purchase, and through whom alone a redemption could be effected, was the purchaser. The question, however, principally argued upon this branch of the case, was as to the jurisdiction of a court of *law* to declare the sale void. It was urged that this class of frauds was peculiarly within the province of a court of equity. The case of *Fox v. Cash*,³ arose upon a statute very much like that of

¹ 5 W. & S. 447. ² 12 Illinois R. 173; 14 Ibid. 223. ³ 11 Pa. State R. 206.

Illinois; the sale was made to the clerk and sustained. By the court: "The clerk to the commissioners is not forbidden by law, to be a purchaser of land sold at public sale by the commissioners for arrears of taxes. Nor is it so opposed to the policy of the law as to make it iniquitous and void. The sale is open to all, except the commissioners themselves, who are the vendors, and cannot, therefore, both buy and sell. The *clerk* is merely the *scrivener*, or ministerial agent of the commissioners. He is, it is true, employed or appointed by the commissioners, subject to their directions and instructions; and without any independent authority or control over such sales, has no power in ordering, arresting or continuing them, or in directing to whom the lands shall be stricken down. Every thing he does in relation to them, must necessarily be in subservience to the directions of the commissioners."

In *Nalle v. Fenwick*,¹ the question as to the right of the deputy sheriff to purchase at the tax sale, arose, but was not discussed; it seemed to be conceded, however, that in this respect the sale was unobjectionable. In *Yancey v. Hopkins*,² where the sheriff who made the sale became the purchaser, the title was held valid in his hands. But in this case, there was a general custom, recognized in a public statute, and proved in the case itself, for sheriffs and their deputies to buy land at tax sales. Roane, J., said: "While there was no express inhibition at that day, in any statute, against the sheriff bidding for his own private emolument, such inhibition is not, on the other hand, to be inferred from the reason of the principle on which, in *other cases*, it has been held that certain descriptions of persons were enabled to

¹ 4 Rand. R. 591.

² 1 Munf. R. 419, 437.

purchase property offered for sale by themselves. The inhibition, in those cases, seems to arise from the confidence placed in, and the internal knowledge acquired by, trustees, commissioners of bankruptcies, auctioneers, etc., which would enable them, if permitted to purchase, to avail themselves of facts coming to their knowledge, in their several characters, and by withholding them from others, to lessen the prices of the articles exposed to sale, to their own emolument. But in the case in question, no confidence has been reposed in the sheriff, and no facts have come to his knowledge which he might abuse to his own advantage; he has no other information on the subject than is derived from the books of the commissioners, as aforesaid; it would be too much to suppose him cognizant of the particular circumstances attending all the tracts of land in his county. This case, then, does not seem to fall within the reason of the principle above mentioned; and it is not shown, by any *adjudged* case, that the inhibition has, in England, been extended to sheriffs or collectors, though, I presume, the case must have occurred in a thousand instances." Again, it was remarked, in the same opinion, that a bid by the sheriff "might be absolutely necessary to counteract combinations to defeat the collection of the revenue, whether arising from the sympathy of the by-standers, or other causes." A statute was afterwards passed in Virginia, prohibiting the sheriff and his deputies from acquiring title to land, under tax sales. In *Taylor v. Stringer*,¹ where the deputy was the purchaser, the title was held void in the hands of a *bona fide* purchaser, who claimed title under the deputy.

¹ 1 Grattan R. 158.

It must be confessed, that no difference in principle exists between a purchase by a sheriff, at his own sale, and that of a collector selling land for the non-payment of taxes assessed upon it. The same policy which forbids the former, is equally opposed to the latter.¹ When this subject again comes before the court, it ought to be carefully considered, for the decisions cited above may be regarded as innovating upon principles which have heretofore been regarded as landmarks.

¹ *Lazarus v. Bryson*, 3 Binney R. 58.

CHAPTER XXV.

OF THE EFFECT OF THE SALE AND DEED, WHERE THE LAND
SOLD WAS EXEMPT FROM, OR NOT SUBJECT TO TAXATION.

THE fact that the land is subject to taxation, is the basis of the power to sell it, in case the owner proves delinquent. If the sovereign power of taxation has never attached to the land, or having once legally attached, the land is exempted from the operation of the taxing power, then it cannot be sold. A sale under such circumstances is void to all intents and purposes.¹ In all cases, if the person taxed, or the subject matter of taxation, be not within the jurisdiction of the officer who makes the assessment, all subsequent proceedings by mere ministerial officers, acting under a warrant or other authority to enforce the collection of the tax, are deemed utterly void, the assessment being *coram non judice*.² The owner is not bound to enjoin the sale of his land under such circumstances, or resort to his remedy against the officers, but may contest the validity of the sale

¹ *Dresback v. McArthur*, 6 & 7 Ohio R. 307; *Buckley v. Osburn*, 8 Ohio R. 180; *Dyer v. Branch Bank of Mobile*, 14 Ala. R. 622; *Coney v. Owen*, 6 Watts R. 435; *Sandford v. DeCamp*, 8 Watts R. 542; *Bolt v. Pearly*, 11 Mass. R. 144.

² *Nichols v. Walker*, Cro. Car. 394; *Perkins v. Proctor*, 2 Wilson R. 382; *Thurston v. Martin*, 3 Sumner R. 497; *Rowe v. Blakeslee*, 11 Conn. R. 479.

whenever the purchaser or his grantee attempts to recover the possession, or establish his title to the land.¹ Where the constitution itself exempts the land from taxation, it is clear that the legislature have no power to levy and collect taxes upon it.² And it would seem to be equally clear, that where the people in the exercise of their sovereign power, in the formation of a constitution with the view to their admission into the Union as an independent State, stipulate with the Federal Government to exempt a particular class of land, or lands held or to be held by particular persons, from taxation, no substantial reason can be assigned against the validity of the exemption.³ But the question, though settled by the weight of authority, is a debatable one, as to the power of the legislature to exempt lands from taxation — indeed, to exempt any species of property or class of persons from the operation of the taxing power. The right to do so has been repeatedly affirmed,⁴ and the exemption treated as a *contract*, the inviolability of which is guaranteed by the constitution of the United States.⁵ However, in *Parker v. Redfield*,⁶ the court remark: “Were this now an *open question*, we might well doubt whether it would be in the power of one legislature by a general law to tie up the hands of succeeding legislatures; and

¹ *Dyer v. Branch Bank of Mobile*, 14 Ala. R. 622.

² *Brewster v. Hough*, 10 N. H. R. 138; *Hardy v. Williams*, 7 Pick. R. 108.

³ *Ante*, 11-12.

⁴ *Tax cases*, 12 Gill. & John. R. 117, and cases there cited.

⁵ *New Jersey v. Wilson*, 7 Cranch. R. 164; *Atwater v. Woodbridge*, 6 Conn. R. 223; *Osborn v. Humphrey*, 7 Conn. R. 335; *Landon v. Litchfield*, 11 Ibid. 251; *Gordon v. Tax Appeal Court*, 3 Howard U. S. R. 133; *Terrett v. Taylor*, 9 Cranch. R. 43; *Fellows v. Pinney*, 13 Vermont R. 526; S. C., 15 Ibid. 26; *Backus v. Lebanon*, 11 N. H. R. 20.

⁶ 10 Conn. R. 490.

whether a statute, exempting a particular species of property from taxation, is in the nature of a contract of perpetual obligation. But these decisions¹ are imperative upon us, and we yield to their *authority*." At a later period, the same court said : " It is certainly *a very high act of legislative power to grant an exemption from all future taxation, so as effectually to tie the hands of future legislatures, under any and all future emergencies.* But this has been held to be properly done ; and it is sanctioned by the highest judicial authority."² And in *Brewster v. Hough*,³ the supreme court of New Hampshire, without expressly deciding the point, held this language in relation to this important question : " There is no doubt that the legislature may provide, by general laws, for the exemption of certain classes of property from taxation, as well as exempt it, in fact, by omitting it in the description of property required to be taxed. Such exemptions will be valid until the law is repealed. But it may well be doubted whether the legislature may contract with the citizen for the *permanent* exemption of his property from taxation. There is no express grant of such power in the constitution. The power of taxation is essentially a power of sovereignty or eminent domain, and it may well deserve consideration whether the power is not inherent in the people under a republican form of government, and so far inalienable that no legislature can make a contract by which it shall be surrendered without express authority for that purpose, in the constitution, or in some other way directly from the people themselves. The legislature may grant exclusive privileges, and

¹ 6 Conn. R. 223 ; 7 Ibid. 335.

² *Seymour v. Hartford*, 21 Conn. R. 447.

³ 10 N. H. R. 138.

make many other contracts, etc. But there is a material difference between the right of a legislature to grant lands or corporate powers, or money, and a right to grant away the essential attributes of sovereignty, or the right of eminent domain. These do not seem to furnish the subject-matter of a contract. But it is unnecessary to decide this point." The reasoning against the power of exemption by special contract, with particular individuals and corporations, is overpowering; it is simply, that every exemption, from its very nature, withdraws the property exempted, from the operation of the taxing power, and thus increases the burdens of the rest of the property holders in the State—and that the right of the legislature, a body acting under the delegated authority of the people, in whom all power is inherent, to part with one of the attributes of sovereignty for a consideration, thus making sovereignty an article of merchandise—cannot be supported upon principle or authority. It is true that the solidity of a principle or rule of construction is not ordinarily to be tested by extreme cases;¹ but where great injustice may be done, if a given power is once conceded to the legislature, it furnishes a strong argument against the power, for the power of legislation is limited by the principles of natural justice, as well as the letter of the constitution. It is to the natural law we resort, for the purpose of securing *equality* in the levy of taxes.² Now, suppose the taxable property of a State to be one hundred million of dollars in value, and the necessities of the government require a revenue of one hundred thousand dollars, but the legislature, in the same law which levies the tax, exempts half of

¹ 8 John. R. 420-1; 12 Ibid. 483.

² *Ante*, pp. 12, 13.

the entire value of taxable property from the levy, the consequence is, that the tax of those who are not thus exempt, will be exactly double the amount it would have been, if all had been taxed equally. When such a power is once conceded, the courts can prescribe no limit to its exercise, therefore it ought to be denied *in toto*. No weighty and insurmountable reason has, as yet, been assigned for the incorporation of such a principle into our constitutional code. On the contrary, so repugnant is the doctrine to every court of justice, that in order to restrain its operation, they have adopted the rule that every exemption must be couched in such plain and unambiguous language, as to satisfy the court, beyond doubt, that the legislature intended to create the exemption. Such a right can never arise by mere *implication*, and all laws granting the exemption are to be *most strictly construed*. The decisions upon this branch of the doctrine are uniform, and admit of no exceptions to the general rule.¹

In the language of the Supreme Court of New Jersey: "A contract like this contended for, which is to bind future legislatures, to the end of time, from raising the necessary taxes for the support of the government, and the exigencies of the country, on a considerable district of the territory of the State, ought at least to be clear and explicit, free from all doubt and uncertainty, not depending on implication

¹ *Kendrick v. Farquar*, 8 Ohio R. 197; *Armstrong v. Treasurer of Athens Co.*, 10 Ibid. 235; *Cincinnati College v. State*, 19 Ibid. 110; *Anderson v. State*, 23 Miss. R. 459; *Stuart v. Davis*, 2 Murphy R. 244; *Chegaray v. Jenkins*, 3 Sand. S. C. R. 409; *Providence Bank v. Billings*, 4 Peters R. 514; *Louisville Canal v. Commonwealth*, 7 B. Mon. R. 160; *Brewster v. Hough*, 10 N. H. R. 138; *Howell v. Maryland*, 3 Gill R. 14; *Platt v. Rice*, 10 Watts R. 352; *Seymour v. Hartford*, 21 Conn. R. 477.

or construction.”¹ It is also held that this power of exemption cannot be exercised by counties, towns, and municipal corporations, unless it is expressly conferred upon them.² When, however, this power of exemption is clearly exercised by the legislature, effect must be given to it by the courts.³ The constitution of Maine provided, that lands which belonged to the commonwealth of Massachusetts “shall be free from taxation, while the *title* to said lands remains in the commonwealth.” In one case it appeared that Massachusetts had contracted to sell the land, but the vendee had not fully complied with the conditions of the contract, though the contract was in full force. This property was taxed and sold, as the property of the vendee, and it was held that the land was exempt, and the sale void. By the court: “This (the provision in the constitution) was intended to mean the legal title, and not the equitable, for it might be perfectly useless to assess and sell lands belonging to the commonwealth, to which an individual had such an equitable and conditional title as exists in the case before us; the condition might never be performed; and if performed, no legal or equitable process could compel Massachusetts to execute a deed, conveying the fee. We are, therefore, of opinion, that the tax in question was illegally assessed, and that therefore it is void, and, of course, nothing passed by the officer’s sale to the plaintiff.”⁴ Lands belonging to the State, or other taxing power, of course are not taxable, and a sale of them is, therefore, illegal.⁵ It is held in Ohio and Michigan, that

¹ *State v. Wilson*, Pennington R. 218. ² *Mack v. Jones*, 1 Foster R. 393.

³ *State Bank v. People*, 4 Scam. R. 303; 2 Harrison N. J. R. 80, and the cases above cited. ⁴ *Emerson v. County of Washington*, 9 Greenl. R. 88.

⁵ *Buckley v. Osborn*, 8 Ohio R. 180; *Stewart v. Shoenfeld*, 13 S. & R. 230.

lands sold by the United States, but upon which sale patents have not been issued, whereby the legal title remains in the Federal Government, are not exempt from taxation, by implication or express law.¹ There is a controversy as to the right which the purchaser at the tax sale acquires under such circumstances, and the remedies to be adopted to enforce it, which will be discussed in a subsequent chapter.

¹ *Gwynne v. Neiswanger*, 15 Ohio B. 367; *Astrom v. Hammond*, 3 McLean R. 107; *Carrol v. Perry*, 4 Ibid. 25.

CHAPTER XXVI.

OF THE EFFECT OF THE SALE AND DEED, WHERE THE TAXES
HAVE BEEN PAID BEFORE THE SALE.

THE delinquency of the owner, is the *essential* fact, upon which the power of sale rests. The authority of the government only extends to those cases where the owner *neglects* to pay the tax in arrear *voluntarily*. When this neglect is shown, the *coercive* remedies of the law may be resorted to, and not before. The law in substance, declares that the tax assessed shall constitute a lien upon the land, and if the tax is not paid within a specified time, the officer charged with the duty is authorized to sell. The right to sell is therefore founded on the fact of the non-payment of the tax. If the tax be paid before the sale, the lien of the State is discharged, and the right to sell no longer exists. When the owner has performed all of his duties to the government, no court would sanction, under any circumstances, the forfeiture of his rights of property. The law was intended to operate upon the unwilling and the negligent citizen alone. Legislative power extends no further. The sale involves an assertion by the officer that the taxes are due and unpaid, and the purchaser relies upon this, or on his own investigations, and his title depends upon its truth.

The title of the purchaser is *contingent*, so far as it may be affected by proof establishing the fact that the tax had been paid before the sale was made. This is an *implied condition*, annexed to every grant of this kind, founded on a sound construction of the law, the power of the government in collecting taxes, and the principles of natural justice. The constitution and the ordinary law, he is bound to know, and *justice* is presumed to have a lodgment in the breast of every man — even in that of a purchaser at a tax sale, who is said to have “but little conscience.” Therefore, every purchaser takes a deed subject to the condition that the taxes have not been paid, and if his title is defeated, he must look to the government for that relief which such a case may require. The return of the delinquent list will justify a sale by the officer, unless the taxes were paid to him in person, or he had knowledge of the fact of payment, but as between the owner and purchaser, the return is not conclusive evidence of the fact of non-payment. The validity of the sale and conveyance necessarily depending upon the fact of delinquency, when this is drawn in question, it is competent to prove payment; and in permitting the owner to make this proof, no rule of law is violated; it is not permitting parol evidence to impugn or destroy a written contract, but it is consistent with the deed; and if the deed is thereby defeated, it arises upon the proof of a fact, upon which, by law, the operation of the deed was made to depend, at the very time of its execution. It would be a monstrous doctrine to hold otherwise.¹ The same

¹ *Curry v. Hinman*, 11 Illinois R. 420; *Jackson v. Morse*, 18 John. R. 441; *Blight v. Banks*, 6 Munroe R. 206; *Rowland v. Doty*, 1 Harrington C. R. 3-11; *Hunter v. Cochran*, 3 Barr. R. 105; *Dougherty v. Dickey*, 4 W. & S. 146; *Stanley v. Smith*, 1 Car. Law R. 511; S. C., Bat. Ed. 124.

principle is applied to sheriff's sales under execution ; there it is held that a sale, based upon a satisfied judgment, is absolutely void,¹ though in one case it was held that a sale to a *bona fide* purchaser would be sustained, unless the satisfaction appeared of record.² The tenacity with which the courts adhere to the doctrine that a sale and deed are nullities, where the taxes were in fact paid prior to the sale, is most strikingly illustrated by the cases of *Rowland v. Doty*, *Jackson v. Morse*, and *Curry v. Hinman*, to which the reader is referred — they are the leading cases upon this point. Where a tract of land, containing 390 acres, was owned in common, and one of the cotenants listed an undivided third in his own name, and duly paid the tax due upon his share, and the whole tract was listed the same year as the property of the other tenant, and sold for the tax assessed upon it, the sale was held void.³ Two surveys interfered, and the owner of the junior survey paid the taxes due upon his entire tract, which of course included a part of the elder survey ; afterwards, the land embraced in the senior survey was sold for taxes, and it was held that no title passed by the sale to any part of the interference.⁴ It has been held that where, *by the mistake of the owner himself*, he pays the tax upon a tract of land which does not belong to him, and was not assessed in his name, the sale, under such circumstances, is legal.⁵

On the other hand, where the owner pays upon the right tract, but the money thus paid to discharge

¹ 6 Ohio R. 430 ; 4 Wend. R. 474.

² 1 Cowen R. 622.

³ *Jones v. Gibson*, Taylor N. C. Term R. 41.

⁴ *Hunter v. Cochran*, 3 Barr. R. 105.

⁵ *Stephens v. Wells*, 6 Watts R. 325.

the lien upon his own land, is appropriated by the mistake of the officer, to another tract, this was held to be a valid payment, and the sale of the land void.¹

¹ *Dougherty v. Dickey*, 4 W. & S. 146. The author is indebted to Judge Lowrie, of Pennsylvania, for the following copy of a very able opinion recently delivered by him, in the Supreme Court of that State, and which has not yet been reported. A part of the opinion sustains the doctrine of the text, relative to the misapplication of the payment of a tax, and the residue will be interesting and useful to the bench and the bar. The case referred to is that of *Laird v. Heister*. Lowrie, J.: "It is important to notice, that the laws to enforce the payment of taxes on unseated lands, give no directions at all relative to the mode in which any of the tax books shall be kept, except so far as they are involved in the general direction, that such land 'shall be valued and assessed in the same manner as other property.' And though some directions are given for advertising, yet, even in this, irregularities are declared not to affect the sales; and then there is, besides, a general declaration, that no irregularities in the assessment, process, or otherwise, shall be allowed to affect the title of the purchaser. Taking this thought with us in reading these laws, we readily discover the following, which are ruling principles in the present cause:

1. The forms in which assessments of unseated lands are made and entered, and the mode of certifying or transmitting them to the county treasurer, are matters of official practice, entirely at the discretion of the commissioners of the several counties, subject only to the condition of being intelligible; and they must be expected to be very various. This is merely an expression of the principle that allows all sorts of public functionaries to adopt and direct their own forms of fulfilling their duties, in cases wherein they are not fully and adequately directed by law. It was overlooked, when it was attempted, (3 Watts R. 260,) to indicate the form in which unseated land taxes ought to appear in the commissioners' office, and the attempt has given rise to some confusion.

2. The authority of the treasurer to sell unseated land for taxes, depends upon the facts, that the land was unseated at the time of the assessment; that a tax appears to have been, and was in fact, assessed upon it by the proper officers; and that the tax has been due for one whole year, and remains unpaid. The absence of either of these facts, involves exemption from the penalties of the acts of 1804 and 1815.

3. This authority has been restricted by construction, in some instances, for the protection of innocent persons who, relying on the customary forms of taxation, may have been led into the mistaken supposition that there was no tax charged upon the land, but only against the owner, personally. (3 Watts R. 260; 4 W. & S. 133; 8 Pa. State R. 169; 14 Id. 404.)

4. The tax books in the offices of the commissioners and treasurer, are not intended to give notice of the liability of land for taxes, but are merely the mode in which the tax accounts are kept; and they are open to be corrected or proved erroneous, when any interests depend upon the facts expressed by them.

5. Placing land taxes on the collectors' duplicates is not, of itself, a declaration, by the taxing officers, that the land is seated, and has no tendency to mislead any one into the supposition that the land is not to be charged as unseated;

No instance is remembered, where the law does not permit the owner to pay the tax and charges

though a departure from a well known usage, in this regard, has been allowed such an effect. If the law had made the tax lists, instead of the tax laws, notice to the world of the liability of land for taxes, then, of course, the tax lists would need to possess those qualities of certainty and completeness, that are appropriate to their function of giving notice. They do not give notice of the liability, but merely define its amount. And if they were to stand for notice, then they ought to affect both parties; but no matter how full, complete and regular may be all the entries, they furnish no foundation for the faith of purchasers, that is not swept away by proof, that the taxes were really paid, or that the land was seated; nor do they bind the person, if the land is in fact unseated. If we say that a tax on land is no lien upon it, unless it appears in the list as unseated, or is placed upon an unseated list, then the tax is good for nothing; for, being actually unseated, the owner is not personally liable for it.

6. The purpose of an inquiry into the mode in which the tax books are kept, in any county, is, generally, to show how they ought to be understood by the court and jury; and it is relevant to notice the usages of the office in keeping them, prior and up to the time of the entry, that is to be interpreted; but when a new usage has been introduced, the old ones may cast no light upon the entries made under it.

7. When the owner of an unseated tract of land goes to the treasurer, and offers to pay to him all the taxes upon it, and does pay the amount demanded by him, and the treasurer credits the payment to another tract, and sells this, it is a good payment, and the sale is void. The unseated land laws are intended to enforce the payment of taxes, and their purpose is fulfilled when the duty is performed. If a man has really, and in good faith, performed his duty herein, to the satisfaction of the proper officers, his land is safe. If it be sold after that, it is through the error of some officer, which cannot be visited on the owner; for the State does not mean that the owners of unseated lands shall warrant the fidelity or competency of its officers. The sale involves an assertion, by the treasurer, that the taxes are unpaid, and the purchaser relies upon this, or on his own investigations, and his title depends upon its truth.

8. When the commissioners purchase unseated land, for taxes duly assessed and unpaid, the provisions of the law, curing all irregularities in the assessment and process, and giving five years for redemption, are as ample a protection to their title as that which is furnished for other cases, by the limitation in the acts of 1804 and 1824.

9. When the commissioners do thus purchase unseated land, and within or after five years allow of its redemption, and convey it accordingly, the transaction, by its very nature, discharges the public duty, rescinds the commissioners' title, and reverts that of the next preceding owner. If a stranger thus redeems, he discharges the public duty, without acquiring the title for himself. (4 W. & S. 298; 10 Pa. State R.)

Without any further specification, the counsel will understand that these principles affirm all the important rulings involved in the charge of the learned President of the Common Pleas, and in the offers of evidence. As to the rest, it is sufficient to say, that we do not perceive that there was any irrelevant or

upon his land, at any time before a sale takes place. "He may arrest the uplifted hammer of the auctioneer, when the cry for sale is made, if it be done before a *bona fide* bid has been made."¹ It is evident that a payment after sale, can have no effect whatever.² The payment of the tax, being matter *in pais*, may be proved by oral evidence ; it is not necessary to introduce the collector's books or his receipt, or produce the assessment roll, but the collector or other officer to whom the payment was made, the agent of the owner, or any person present at the time of the payment, are competent witnesses to prove the fact.³

incompetent evidence admitted, or any questions of fact submitted to the jury without evidence, or any improper instructions given to them."

¹ *Early v. Doe*, 16 Howard U. S. R. 617-618.

² *Collins v. Barclay*, 7 Barr R. 67.

³ *Dennett v. Crocker*, 8 Greenl. R. 239. The same principle was settled at *nisi prius*, in England, in an action upon a covenant "to pay all taxes and assessments upon the land," and is reported in Campbell or Espanassee, but the author is unable to make a special reference to the volume and page, where it may be found, although he has cited it on several occasions, at the bar.

CHAPTER XXVII.

OF THE EFFECT OF THE SALE AND DEED WHERE A REDEMPTION FROM THE SALE HAS BEEN MADE.

THE purchaser, whether he acquires an equitable title to the land evidenced by a certificate, or the legal estate by virtue of a deed of conveyance, takes the estate subject to all of the rights of redemption which are reserved by the statute under which the sale was made. His title is a *conditional* one. The sale may have been made and all of the previous proceedings conducted, in strict conformity with the law, and yet a redemption by the owner will defeat the contingent title of the purchaser. This is evident. The purchaser acquires his right to the estate under the same law, which confers the privilege of redeeming upon the owner. That law is the source of his title, and by it his rights must be determined. If no redemption is effected, the estate becomes absolute in him.¹ On the other hand, if the owner redeems, within the time and in the manner prescribed, the interest acquired by the sale is *ipso facto* gone forever.² Where a right of redemption is given to owners who labor under no disability whatever, the usual course

¹ *Cooper v. Brockway*, 8 Watts R. 163.

² *Blight v. Banks*, 6 Monroe R. 206; *Taylor v. Steele*, 1 A. K. Mar. R. 316.

is to deliver to the purchaser a certificate of the sale, which entitles him to a deed unless the redemption is seasonably made. But, sometimes a deed is executed and delivered to the purchaser immediately after the completion of the sale, or lodged in some public office as an *escrow* to take effect in case a redemption is not made.¹ And where a deed is made after the expiration of the ordinary period of redemption allowed to those who are not legally incapacitated to protect their own rights, it usually, in express terms, or by implication arising upon the construction of the deed compared with the law under which it was made, contains a condition that the estate of the purchaser shall be defeated in case a redemption is made by an infant, *feme covert*, or lunatic, within a certain period of time after their respective disabilities are removed. Thus the Illinois statute of January 26, 1826, prescribes the form of the deed to be executed,² which form, after granting the land to the purchaser or his assigns, contains this clause, viz.: "*subject, however, to all the rights of redemption provided for by law.*" Whatever form the transaction is made to assume by the particular statute under which the sale and deed are made, the substance of it is that the purchaser acquires a contingent title, dependent upon the non-redemption from the sale by those in whose favor the right is reserved.³

¹ *Ante*, Chap. 16, pp. 347-8

² *Ante*, p. 436.

³ The Illinois Statutes, being more familiar, are here inserted, as illustrations of the *general nature* of these redemption laws. 1. The act of September 17, 1807, provides "That all persons shall be allowed two years to redeem their land; residents by paying the price it sold for, with one hundred per cent. thereon, to the clerk of the court of Common Pleas, in their respective counties; the non-residents by paying at the same rate, to the auditor, which money, the said clerks and auditor shall pay to the respective purchasers, their agents or attorneys, whenever thereto required, and of the receipts of which they shall

The question — who may redeem? — is probably more important than any other connected with this

keep a record in their respective offices, which at all times shall be evidence sufficient to vacate the sales as aforesaid." (Pope's Statutes, 577, Sec. 16.)

2. The statute of March 27, 1819, contained the same provision, with this addition, viz.: "*Provided, always*, That when any property, sold for taxes by virtue of this act, shall belong to heirs, any of whom are not of lawful age, the same lands may be redeemed as aforesaid, at any time within one year after the youngest heir becomes of age." (Laws 1819, p. 317, sec. 11.)

3. By the act of February 19, 1827, it was enacted that "Any lands which shall be sold by the auditor for the taxes and costs thereon, may be redeemed at any time within two years from the day on which the same were sold, by paying into the State treasury, (upon the auditor's certificate, as in other cases,) double the amount of the taxes, interest and costs for which they were sold. Lands belonging at the time of sale, wholly or in part, to heirs under lawful age, may be redeemed at any time before the expiration of one year from the time when the youngest of said heirs becomes of full age: but no person shall be permitted to redeem any lands sold for taxes, unless he shall, at the same time, pay into the treasury all taxes which may have become due subsequently to such sale, together with interest thereon, at the rate of six per cent. per annum, from the time they became due. Whenever any person or persons, after the expiration of two years from the time when any tract of land was sold for the taxes thereon, shall apply to the auditor to redeem such land, under the provisions of this act, relative to lands owned by minor heirs, it shall be incumbent on the person or persons so applying, to produce to the auditor a certificate from the judge, clerk, or other proper officer of the proper court having jurisdiction of wills and testaments, and intestate estates, that it appears from the records of said court, that such person or persons are the legal heir or heirs of the former owner of said tract of land; and that said former owner died before the day on which said land was sold for taxes; and also certifying the real age of the youngest of said heirs. In cases where there has been no will, nor any settlement of the intestate estate, before the court to which such jurisdiction appertains, such heir or heirs shall go before some court of record, and exhibit proof of his, her, or their heirship, minority and present age; and on producing the certificate of the clerk of such court, to the above facts, such heir or heirs shall be entitled to the same rights of redemption as above provided. Such certificate shall bear the signature of the clerk of the court, the genuineness of whose authentication shall be certified by the judge, and the official character of such judge shall be certified by the Secretary of the State in which such proof shall be exhibited, with the seal of said State affixed to such certificate. Whenever any heir shall redeem any land as aforesaid, the written evidence on which his right to redeem the same is founded, shall be delivered to the auditor, and by him filed in his office."

4. The act of February 27, 1833, thus provided: "Any lands which may be sold at any time as aforesaid, for taxes, interest, and costs due thereon and unpaid, may be redeemed at any time within two years from the date of such sale, by paying to the clerk of the county commissioners' court of the proper county, for the use of the purchaser or purchasers, double the amount of the

subject. The terms of the statutes are, that "the owner," "the party in interest," or "any person,"

taxes, interest and costs for which the same may have been sold. Lands that may belong, at the time of such sale, in the whole or in part to heirs under lawful age, may be redeemed at any time before the expiration of one year from the time the youngest of said heirs shall become of full and lawful age; but no person shall be permitted to redeem any lands sold for taxes, interest and costs, as aforesaid, unless he shall at the same time pay to said clerk, all taxes which may have become due subsequent to each sale, together with interest thereon, at the rate of six per centum per annum, from the time they become due; and if any purchaser of lands sold for taxes, shall suffer the same to be sold before the expiration of two years allowed for the redemption of the same, the person whose lands have been thus sold, may redeem the same from both sales, by paying to the said clerk, for the use of the first purchaser, the tax and costs of the first sale, and for the use of the second purchaser, double the amount of the taxes, interest and costs for which the same may have been sold at such second sale. When any person or persons shall apply to the clerk as aforesaid, to redeem any lands sold for taxes under the provisions of this act, relative to minor heirs, it shall be incumbent on the person or persons so applying, to produce to said clerk a certificate of the judge, clerk, or other proper officer of the proper court, having jurisdiction of wills and testaments, and intestate estates, that it appears from the records of said court that such person or persons are the legal heir or heirs of the former owner of said tract or tracts of land, and that such former owner died before the said tract of land was sold for taxes, and also certifying the true age of the youngest of such heirs, and in cases where there has been no will, nor any settlement of such intestate estate before the court to which such jurisdiction appertains, such heir or heirs shall go before some court of record, and exhibit proof of his, her or their heirship, minority and age; and on producing the certificate of the clerk of such court to the above facts, such heir or heirs shall be entitled to all the rights of redemption as are herein before allowed: also, such certificate of heirship shall bear the signature of the clerk of the proper court, the sufficiency of whose authentication shall be certified by the judge of such court; and in all cases where such certificate shall be made without this State, the official character of such judge shall be certified by the Secretary of State or territory in which such proof shall be exhibited, with the seal of the State or territory thereto affixed, and the certificate containing the evidence on which the right to redeem is predicated, shall in every case be delivered to the said clerk, and by him filed and preserved in his office." (Laws 1833, p. 531-2, Sections 10 and 11.)

5. The statute February 26, 1839, made this provision relative to a redemption, viz.: "Lands and real estate sold under the provisions of this act, may be redeemed from such sale, at any time before the expiration of two years from the date of such sale, by any person who will pay to the clerk of the county commissioners' court of the proper county, double the amount for which the same was sold, and all taxes accruing after such sale, together with the interest on the amount of each year's tax, at the rate of six per cent. per annum, from the first day of September in each year, until paid; and in all cases where lands are redeemed as aforesaid, the person owning the land when it was listed for

may redeem. The term *owner* is less extensive in its signification than either of the other expressions.

taxation, and the heirs or assigns of such person, shall be considered as restored to all the rights which he, she or they had in and to such land at the time the same was listed for taxation. Lands and real estate which, at the time of sale, belonged to infants, *femes covert*, or lunatics, may be redeemed upon the terms specified in the preceding section, at any time within one year from the time the disabilities of such person shall cease to exist; and if there be several infants owning a joint, or joint and several interest in any lands or real estate sold for taxes, such infants, or any one of them, may redeem the same from such sale at any time within one year after the youngest one of them shall arrive at the age of twenty-one years; and any person claiming the right to redeem land under the provisions of this section, shall produce to the clerk of the county commissioners' court of the proper county, the affidavit of some credible person, stating who owned the same at the time of the sale thereof, and if the owner was a *feme covert* at the time of sale, stating that fact; or if there were several infant owners, stating that fact, and stating the age of the youngest of such infants; and if the clerk shall be satisfied, from the facts stated in the affidavit, that the lands proposed to be redeemed are subject to redemption under the provisions of this section, or any other law of the State, he shall file the affidavit so presented, and permit the lands to be redeemed upon the conditions which are or may be required by law; and such redemption shall operate to restore to the owner or owners of the land, his, her or their heirs or assigns, all rights which he, she or they had in and to the same at the time of sale: *Provided*, however, that the certificate of redemption shall not be evidence of any other fact than that the redemption money was paid. Affidavits presented to the clerks of the county commissioners' court of the several counties in this State, to enable persons to redeem lands sold for taxes, may be taken before any judge or clerk of a court of record in this State, and certified under the hand and seal of such judge or clerk; or they may be taken before any judge or clerk of a court of record without the State, and certified as aforesaid." (Laws 1838-9, pp. 16-17, Sections 38-40.)

6. The statute of March 3, 1845, thus provided, that "Real estate, sold under the provisions of this chapter, may be redeemed at any time before the expiration of two years from the date of sale, by the payment, in specie, to the clerk of the county commissioners' court of the proper county, of double the amount for which the same was sold, and all taxes accruing after such sale, unless such subsequent taxes have been paid to the collector, as may be shown by the collector's receipt, by the person redeeming, with six per cent. interest thereon, from the first day of May, in each year, up to the time of payment; *Provided*, that if the real estate of an infant, *feme covert*, or lunatic; be sold for taxes, the same may be redeemed at any time within one year after such disability be removed, upon the terms specified in this section." (R. S. 1845, p. 447, Sec. 69.)

7. And by the act of February 12, 1853, it is enacted, that "Real property, sold under the provisions of this act, may be redeemed at any time before the expiration of two years from the date of sale, by the payment, in specie, to the clerk of the county court of the proper county, of double the amount for which the same was sold, and all taxes accruing after such sale, with ten per cent.

Ordinarily, ownership means the right by which a thing belongs to some one in particular, to the exclusion of all other persons. The owner is he who has dominion of a thing, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, except so far as he may be restrained by law, or some covenant or agreement. It is the highest grade of title. Under the statute of Illinois, which gave to the *owner* the right to recover a penalty of eight dollars for every tree cut upon his land by a trespasser, the supreme court held that to authorize a recovery, the plaintiff must be the *owner of the fee*.¹ The same principle was recognized in an insurance cause, upon a question relative to the representation of ownership by the assured.² But where a widow petitioned for an assignment of her dower, and in her petition alleged that her husband was "joint owner and proprietor" of the land, etc., it was held that this language did not import an inheritable interest.³ On the other hand, in construing the redemption laws, the courts hold that the word *owner* is a generic term, which embraces the different species of interest which may be carved out of a fee simple estate. This construction is the only one which can effectuate the

interest thereon, from the day of sale, unless such subsequent tax has been paid by the person for whose benefit the redemption is made; which fact may be shown by the collector's receipt; *Provided*, that if the real property of any minor heir, *feme covert*, or lunatic, be sold for taxes, the same may be redeemed at any time within one year after such disability be removed, upon the terms specified in this section; which redemption may be made by their guardians or legal representatives." (Laws 1853, p. 81, Sec. 43.)

There are other laws relative to the redemption of lands forfeited to the State, or bid off by the several counties, which contain similar provisions, and therefore need not be set forth at large.

¹ *Wright v. Bennett*, 3 Scam. R. 258; *Whiteside v. Divers*, 4 Ibid. 336; *Jarrot v. Vaughn*, 2 Gilm. R. 132.

² *Illinois Mutual Fire Insurance Co. v. The Marseilles Manufacturing Co.*, 1 Gilm. R. 266.

³ *Davenport v. Farrar*, 1 Scam. R. 315.

intention of the legislature, and protect the interests of all parties concerned in the land sold for the non-payment of taxes. In the same estate there may exist a fee simple and life interest, or a leasehold. The estate may have been mortgaged to secure a debt, and judgment creditors may have liens upon it, and the land may be in the adverse possession of a stranger to the title, and whose possession may be ripening into a right. Each is an owner according to the extent of his interest or claim, and each has a right to protect his interest by a redemption from the tax sale. No one can complain of this—the government collects her tax, and the purchase-money is refunded to him who claims under the tax sale. Take the case of the judgment creditor: the debtor by collusion with the purchaser might divest himself of title so as to defraud the creditor, unless the latter had a right to redeem, and thus disencumber the land and subject it to his lien. It may therefore be laid down as a general rule, that any right, whether in law or equity, whether perfect or inchoate, whether in possession or action, amounts to an ownership in the land—and that a charge or lien upon it constitutes the person claiming it, an owner, so far as it is necessary to give him the right to redeem. No judicial proceedings take place upon an application to redeem, (except in Ohio,) the officer, who receives the money and executes the certificate of the redemption, acts in a ministerial capacity, and his decision is not conclusive upon the purchaser; the party who redeems acts at his peril. If it turns out that he had no interest whatever to be protected by the redemption, his act of redemption can neither vest title in him, or divest that of the tax purchaser. It would seem then, that

the doctrine is, that any person claiming an interest in the land has a right *prima facie* to redeem. But if it turns out that he had no such ownership as to authorize the redemption, his act is a harmless one. Another reason which may be assigned for this position is, that the law does not provide, for settling questions of title before the redeeming officer. The act is not judicial in its nature, and no notice is provided by law in favor of the purchaser. It surely was never contemplated that rights should be affected without an opportunity of being heard. The authorities fully sustain the principles contended for. Thus, in *Dubois v. Hepburne*,¹ the plaintiff deduced a regular title from the commonwealth, and the defendant relied upon a tax sale, the regularity of which was not questioned, but the plaintiff attempted to defeat it by proof of an offer to redeem. The evidence was that one Robert Quay, who claimed an undivided interest in the land, in right of his wife, and who had made an ineffectual effort to partition the land among the several tenants in common, offered to pay the amount necessary to redeem to the treasurer, which the treasurer declined to receive. The law of Pennsylvania, under which this question arose, was in these words: "If the owner or owners of land sold as aforesaid, shall make or cause to be made, within two years after such sale, an offer or legal tender of the amount of the taxes for which the said lands were sold, and the costs, together with the additional sum of twenty-five per cent. on the same, to the county treasurer, who is hereby authorized and required to receive and receipt for the same, and to pay it over to the said purchaser on demand; and if it shall be

¹ 10 Peters R. 1.

refused by the said treasurer, or in case the owner or owners of lands so sold shall have paid the taxes due on them previously to the sale, then, and in either of these cases, said owner or owners shall be entitled to recover the same by a due course of law, but in no other case, and on no other plea, shall an action be sustained." The court held that Quay had such an interest as to entitle him to redeem, and that the *offer* to pay was equivalent to the tender or payment of the money. The grounds of the decision are important, as the court lay down these rules as applicable to the right of redemption under the law in question:

1. That such laws are to be liberally construed, and not narrowed down by a strict construction.
2. That any person having a legal or equitable interest in the land, may redeem, whatever may be the evidence of his title. The court remark: "A law authorizing the redemption of land so sold, ought to receive a liberal and benign construction in favor of those whose estates will be otherwise divested, especially where the time allowed is short, an ample indemnity given to the purchaser, and a penalty is imposed on the owner. The purchaser suffers no loss; he buys with the full knowledge that his title cannot be absolute for two years; if it is defeated by redemption it reverts to the lawful proprietors. It would, therefore, seem not to be necessary for the purposes of justice, or to effectuate the objects of the law, that the right to redeem should be narrowed down by a strict construction. In this case, we are abundantly satisfied that it comports with the words and spirit of the law, to consider any person who has any interest in lands sold for taxes, as the owner thereof, for the purposes of redemption. Any right,

which in law or equity amounts to an ownership in the land; any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate, makes the person the owner, so far as it is necessary to give him the right to redeem. The decision of this case does not make it necessary to go further than to determine that Quay, as a part owner, had a right to redeem; that he caused an offer to redeem to be made to the treasurer within two years, as well as to the defendant, both of whom refused to accept the redemption money. This brings the case within the provisions of the law; it does not require a payment or tender; an *offer* and *refusal* is made equivalent to a receipt of the money by the treasurer, and authorizes a recovery of the land by suit, as if no sale had been made."

In *Chapin v. Curtenius*,¹ which was an ejectment, the plaintiff, to defeat a tax title relied on by the defendant, read in evidence a certificate of redemption executed by the proper officer; the defendant thereupon offered to prove that said certificate was issued by the officer, without there being on file in his office any evidence or papers to authorize the granting of the certificate. The circuit court refused to admit such testimony, and the defendant excepted. The judgment was affirmed by the supreme court. Treat, C. J.: "The certificate of redemption, in this case, being in proper form, was clearly admissible in evidence. It proved the payment of the redemption money by the heirs of Freeman; and it appeared from the other evidence in the case, that they had a clear right to redeem. This proof showed a valid redemption from the sale to the defendant, and that

¹ 15 Illinois R. 427.

the heirs were reinstated in all their former rights in the premises. The certificate itself was not evidence of such a redemption. The statute only makes it evidence of the payment of the redemption money, leaving the right to redeem to be established by other proof. The question whether there has been a valid redemption of the lands of infants, does not necessarily depend on the fact that the clerk has or has not preserved the proof upon which the redemption was founded. The statute requires an affidavit of the facts to be presented to the clerk, and filed by him. Two objects are contemplated by this requisition. The affidavit furnishes the evidence upon which the clerk is to determine the right of the party to redeem; and it is to be preserved for the benefit of all who may be interested in the land. The mere failure of the clerk to file the affidavit, ought not to prejudice the party making the redemption. If the evidence is not preserved, he should be permitted, when the validity of the redemption is drawn in question, to show that he had a good right to redeem. So, if the decision of the clerk is not conclusive, and he allows a redemption upon insufficient proof, the party should be permitted to sustain his right to redeem when put in issue. The ruling of the court upon this branch of the case was unexceptionable." Under the statute of Ohio,¹ this question was presented to the supreme

¹ It is deemed advisable to set forth the Ohio statute at large, because it is the only one which provides for judicial proceedings, upon the application to redeem, and because it is more perfect in its details than any other. The act of March 3, 1831, provided, "That all lands and town lots which have been, or may hereafter be sold for taxes, may be redeemed at any time within two years from and after the sale thereof; and all lands and town lots belonging to minors, *femes covert*, insane persons, or prisoners in captivity, and which have been, or hereafter may be sold for taxes, may be redeemed at any time within two years from and after the expiration of such disability. That all applications for the redemption

court in *Masterson v. Beasley*,¹ upon *certiorari*. It appeared that in November, 1826, an application was

of lands or town lots, sold for taxes, shall be made to the court of Common Pleas, of the county in which such lands or town lots are situated; and if any such tract be divided by a county line, application for the redemption thereof shall be made in the county in which such land was sold. That the party intending to make application for the redemption of any land or town lot, sold for taxes, shall give notice in some newspaper printed in the county in which he intends to make such application, if any be printed therein, and if none be printed therein, then in some newspaper circulating in such county; which notice shall describe the land or lot, in the same manner that it was described on the tax duplicate, at the time of the sale thereof; stating the quantity in the original tract, the quantity sold, the name in which the same stood charged with taxes at the time of the sale, and the name of the person to whom sold; and shall state that application will be made to the court of Common Pleas, at their next session in said county, for an order of redemption; and shall be inserted in such newspaper at least six weeks successively prior to the sitting of said court. That the party intending to make such application, shall, at the time of publishing the aforesaid notice, deposit, with the clerk of the court to which the application is to be made, an amount of money equal to that for which such land or lot was sold, and the taxes subsequently paid thereon by the purchaser, or those claiming under him, together with interest, and fifty per centum on the whole amount paid by such person, including costs. That if the court to which such application shall be made, shall be satisfied that due notice has been given, as required in the third section of this act, and that the deposit required by the preceding section has been made, they shall proceed to examine the testimony of such applicant, relative to his right of redemption, and the counter testimony of the adverse party, if any be offered. And if, on such examination, the court shall be satisfied that the applicant is entitled to redeem such land or town lot, they shall make an order of redemption, which shall vest in the applicant all the title which passed by such sale, and shall award restitution of the premises, and direct that the applicant pay the costs of the application; and the court shall, at the same time, order the money so deposited as aforesaid, to be paid to the adverse party. That when any joint tenants, tenants in common or coparceners, shall be entitled to redeem any land or town lot, sold for taxes, and any of the persons so entitled shall refuse to join in the application for an order of redemption, or from any cause cannot be joined in such application, the court may entertain the application of any one of such persons, or so many as shall join therein, and may make an order for the redemption of such proportion of said land or lot, as the person or persons making such application shall be entitled to redeem. That in case any lasting and valuable improvements shall have been made by the purchaser at a sale for taxes, or by any person claiming under him, on any land or town lot, for which an order of redemption shall be made, as aforesaid, the premises shall not be restored to the person obtaining such order, until he shall have paid or tendered to the adverse party, the value of such improvements; and if the parties cannot agree on the value of such improvements, the same proceedings shall be had in relation thereto as

¹ 3 Ohio R. 301.

made to the Common Pleas by Beasley, as agent of the minor heirs of Massie. In support of the application, Beasley produced the certificate of the auditor of State, showing that 100 acres of land charged with taxes in the name of John Jonett, had been sold to Masterson, the respondent, on December 29, 1823, for the taxes of 1821, 1822 and 1823, for the sum of \$5; he also produced the auditor's receipt, showing that the amount required to redeem had been deposited with the auditor December 20, 1825; and it appeared further, that the notice of the application had been duly given. The bill of exceptions shows that a patent from the United States to the heirs of Massie was produced, and that proof of pedigree, and the ages of the respective heirs was also proved. Masterson then introduced a judgment of the U. S. court against

shall be prescribed in any law existing at the time of such proceedings, for the relief of occupying claimants of land : provided, that no purchaser of any land or town lot, sold for taxes, nor any person claiming under him, shall be entitled to any compensation for any improvements which he shall make on such land or town lot, within two years from and after the sale thereof. That the person obtaining an order for the redemption of any land or town lot, as aforesaid, shall, within thirty days after the date thereof, cause a certified copy of such order, with the seal of the court affixed thereto, to be recorded among the records of deeds, in the county wherein such land or lot is situated."

The amendatory act of March 16, 1839, provided, "that any person or persons entitled to redeem lands or town lots sold for taxes, or his or their agent or attorney, may, at his or their discretion, tender to the purchaser or purchasers, or his or their agent or attorney, the amount of taxes, interest and penalty due thereon, under the provisions of the fourth section of the act aforesaid, instead of depositing the same with the clerk of the court as prescribed in said fourth section; and if the said purchaser or purchasers, his or their agent or attorney, will not accept the same, the owner or owners, his or their agent or attorney, may make an application to the court of Common Pleas for the redemption of the same, as provided for in the act to which this is an amendment; and the costs of such application shall abide the event of the same, as in other cases, any provision in the act to which this is an amendment, to the contrary notwithstanding. This act, and that to which this is amendatory, shall apply not only to sales for taxes under the laws of the State, but also to all sales for taxes of lands or lots, under or by virtue of the laws or ordinances of any city or town corporate."

Massie's heirs, an execution issued thereon, and a sale and conveyance by the marshal to Charles Johnson. The grounds on which the application was resisted, were, 1. The agency of Beasley was not shown. 2. The title was in Johnson, and not in Massie's heirs. The Common Pleas held that the application to redeem ought to be sustained, and made an order accordingly. This judgment was affirmed. By the court: "The law for the redemption of land sold for taxes is *equitable* in its provisions, and ought to receive a liberal interpretation. It provides for the security of the purchaser, and protects his right in any event. If the land be redeemed, the purchaser's money and interest must be refunded in all cases; and if the applicant has not been under any legal disability, he must pay fifty per cent. in addition, and must also pay for any improvements which may have been made by the purchaser. Such being the conditions of a redemption, the purchaser cannot complain, nor can he expect a rigid construction of the statute against the applicant. An examination of the record, certified from the Common Pleas, shows that the proceedings, on the part of the applicants, have been technically correct. The question, whether Beasley was legally authorized to represent the minor heirs of Massie, does not in any degree affect the merits of the case, nor does it concern the rights of the purchaser. The court below were satisfied with the evidence of his authority. The guardians of the minors have not questioned it, nor can the purchaser be permitted to do so. As the redemption is made in the name, and for the benefit of the heirs, there is no ground for apprehending the improper intermeddling of a stranger. It is a matter of but little

moment, in what way the agent derives his power. He acts as an attorney in fact, and if his authority is not disputed by his principal, no other person has a right to complain, because none other have been injured. The purchaser of the tax title must receive everything to which the law entitles him, before the order for a redemption can be operative. The second error assigned is not exactly true in point of fact. The sale by the marshal does not necessarily show that the heirs of Massie have been divested of their legal title. The validity of that sale depends on the legality of the judgment and subsequent proceedings, which the heirs are at liberty to contest; and having this privilege, they must be permitted to protect themselves and their possessions against others. If this objection to the right of redemption by the heirs should prevail, their right to contest the title claimed under the marshal, would be of but little use; for, whatever might be the result of such a contest, their title would be lost by the collector's sale. But the statute does not require the person who applies to redeem, to show a legal title in himself. The only provision on that subject is, that if, on examination, it shall appear to the court that the claimant has a legal right to redeem such land, or any part thereof, the court shall adjudge the same to him, etc. It is no part of the duty of the court to decide questions of title on applications like this. They are to inquire whether the party has a right to redeem, and not whether he has a perfect title to the land. In the Virginia Military District, where the land in question is situate, it may happen that one person claims under a junior entry not carried into grant, while another has the possession, and a patent on an

elder entry, each party believing himself to have the better title. In such a case, it would be difficult to decide who had the right to redeem, if the construction of the plaintiff be correct. In a court of law the patent must prevail. In a court of equity, the person holding the junior entry might prevail. This and similar cases, will show the embarrassment to which the court of Common Pleas may be exposed, if they are to decide questions of title on applications of this kind. A stranger, having no interest in the land, will not incur the trouble and expense of redeeming in his own name, nor his own right; but if such an attempt should be made, it could not succeed, because it is confessedly the duty of the court to require satisfactory evidence of a right to redeem. The applicant must show that he, or those for whom he professes to act, are in some way connected with the title to the premises, as by deed, descent, contract or possession under claim of title, either of which will be sufficient. An equitable title, or a naked possession, may give a legal right of redemption under the statute, which was not intended to require investigations of title, further than may be necessary to prevent *impertinent* applications. This being our view of the subject, it follows that the proceedings, and the order of the court below, must be affirmed."

The principle, that this class of laws should be construed liberally, was sustained in *Patterson v. Brindle*,¹ and in *Winchester v. Cain*.² In *Shearer v. Woodburn*,³ it was held that a purchaser at an execution sale of land, over which the debtor exercised acts of ownership, and who was reputed to be the owner, was

¹ 9 Watts R. 99.

² 1 Robinson's Lou. R. 421.

³ 10 Pa. State R. 511; S. C., 11 Ibid. 341.

entitled to redeem. The general law which authorizes the sale of land for the non-payment of taxes assessed thereon, embraces as well the land of infants as that belonging to adults;¹ and under a statute authorizing a redemption by "*orphans*," minors acquire no rights whatever.² A widow claiming dower in land sold for taxes in the life-time of her husband, has no right to redeem under the statute of Illinois, passed February 26, 1839, which confers such right upon "*femes covert*." That statute applies to married women who owned the land at the time of the sale, and not to those who claim a contingent interest in right of their husbands.³ In *Chapin v. Curtenius*,⁴ an agent was permitted to redeem without proof of his authority. So in *Masterson v. Beasley*.⁵ A power of attorney to sell land authorizes the attorney to redeem from a tax sale, because his power of sale may prove ineffectual, unless the power of disencumbering the land is vested in him by implication.⁶ So of a power "to take care of land."⁷

The redemption must of course be made within the time fixed by law, or the purchaser's title will become absolute. And the mode and manner pointed out by the statute must be pursued. The proper officer, must act as the agent of the law in effecting the redemption, or the redemption will be ineffectual. The owner at his peril must pay to the officer the full amount necessary to redeem the estate; and it is important to look carefully into the law and the facts, in order to ascertain the precise sum due. The law, and the order of the inferior tribunal levying

¹ *Elliot v. Gerrard*, 1 A. K. Mar. R. 472; *Hood v. Mather*, 2 Ibid. 558.

² *Downing v. Shoenberger*, 9 Watts R. 298. ³ *Finch v. Brown*, 3 Gilm. R. 488.

⁴ 15 Ill. R. 427.

⁵ 3 Ohio R. 301.

⁶ *McCord v. Bergantz*, 7 Watts R. 487. ⁷ *Patterson v. Brindle*, 9 Ibid. 98.

the tax, will show the rate of the levy for the year in question. The costs, interest, penalty and back taxes can be readily ascertained by comparison of the law and facts. The parties in interest cannot be too circumspect in their examination with a view to ascertain the amount of the redemption money. The maxim *de minimus*, etc., possesses no healing virtues in case the owner makes a blunder in this respect. The maxim, as has been shown, is seldom applied in favor of the purchaser, and it is presumed to be equally inapplicable against him. The condition imposed upon the former owner is usually plain and easily understood, and it is his duty to comply with its exact terms. Courts will construe the law liberally in his favor, but his acts must be construed like those of the officer and purchaser, where duties are imposed upon them. In *Bright v. Boyd*,¹ where the law permitted a minor to redeem within eight years from and after the sale, the facts were, that the purchaser at the tax sale conveyed to a stranger, and by mesne conveyance the title became vested in one Gilman; a tender was made to Gilman in season, but he refused to receive it, and the only question was, whether the tender ought not to have been made to the purchaser at the sale. Story, J.: "We think otherwise; for upon the natural and indeed almost necessary construction of the statute, the right of redemption must be against the party who is possessed of the tax title, at the very time of the redemption; for such party alone is entitled to the redemption money, as holding the conditional estate; and a tender to any other person, in whom the title is no longer vested, would displace his rights, and might deprive him of the

¹ 1 Story R. 478.

intervening charges, which had been incurred by him, and for which he might justly claim remuneration under the statute." The Mississippi statute required the owner, in case he desired to redeem, to tender the amount necessary to effect the redemption to the purchaser. In *Bacon v. Conn.*,¹ the complainant made the tender in due season—but afterwards demanded the surrender and cancellation of the tax deed; it was held that this latter demand did not vitiate the tender, and a decree of cancellation was entered. The code of Louisiana authorized a redemption upon condition that the owner would pay to the purchaser the amount of his bid, with all costs and charges, eight per cent. interest, and the value of all improvements made upon the land; it was held that an offer to redeem and a refusal by the purchaser to render an account, was equivalent to a redemption.²

The receipt or certificate of the proper officer, is *prima facie* evidence of a redemption.³ Or the records of the office where the redemption is effected, or sworn copies thereof, may be resorted to. Loose declarations of parties will not be admitted in questions of this character.⁴ A *mandamus* is an appropriate remedy, where a redemption is improperly refused by a public officer.⁵ The law of New York and Illinois, relative to redemption notices, has been stated in a preceding chapter, but a case relative to the mode of computing time in this class of cases, may be stated in this connection. The statute of New York made it the duty of the city authorities to give at least *six months'* notice to redeem from tax sales,

¹ 1 S. & M. Ch. R. 348. ² *Brooks v. Hardwick*, 5 Lou. An. R. 675.

³ *Taylor v. Steele*, 1 A. K. Mar. R. 316. ⁴ *Lane v. Sharpe*, 3 Scam. R. 567.

⁵ *Finch v. Brown*, 3 Gilm. R. 488.

before the expiration of *two years* after such sale, by publication in a newspaper, at least once in *each week*, for four *weeks* successively. In *The People v. The Mayor of New York*,¹ the notice to the owner was valid, if *lunar* months were intended by the statute, otherwise it was void. The court held that *solar* months were designed. By the court: "Does the word *months*, in the statute, mean *lunar* or *calendar* time? The general rule which must be applied to this case is, that unless there is something in the statute indicating that the legislature intended calendar time, this term must be construed to be a lunar month. I am of opinion there is enough in the statute authorizing such a conclusion. It allows the owner *two years* from the time of the sale within which he may redeem, and requires the corporation to give public notice, at least six months before the expiration of that period, for four weeks. Now, as calendar time is used, by the legislature, in fixing the period for redemption, it is a just and reasonable inference that they intended to use it in fixing upon the division or period of time specifying the notice to be given the owner to redeem. As the one period, in express terms, is calendar time, and the six months immediately succeeds it, and were intended to include part of it, it should be construed to mean the same, otherwise we must believe the legislature intended to fix different periods, by different calculations of time, in the same breath, and on the same subject-matter, and without any conceivable purpose."

¹ 10 Wend. R. 393.

CHAPTER XXVIII.

OF THE EFFECT OF THE SALE AND DEED, WHERE THE OFFICER
HAS ABUSED OR EXCEEDED HIS AUTHORITY.

It is a general principle, that if in the execution of an authority conferred *by law* upon a public officer or private individual, an abuse or excess of the authority occurs, the entire proceedings under the authority are rendered void, and the person committing the act complained of as an abuse or excess, becomes a trespasser, *ab initio*. And it is immaterial whether the authority is derived from the common or statute law ; or whether the abuse or excess consists of an act of commission or omission. In each instance the act is illegal, but the remedy varies according to the circumstances of each particular case.¹ On the other hand, the abuse or excess of an authority *in fact* does not render the entire execution void, but only the illegal part of the transaction. But even in this case the courts must be enabled to separate that which was properly done, from that part which there was no

¹ *The Six Carpenters' Case*, 8 Co. 144 ; *Bagshaw v. Goward*, Cro. Jac. 147 ; *Taylor v. Cole*, 3 T. R. 292 ; *Winterbourne v. Morgan*, 11 East R. 395 ; *Auscomb v. Shore*, 1 Campb. R. 283 ; *Messing v. Kemble*, 2 Ibid. 115 ; 1 Wils. R. 154 ; 2 W. Bl. 1218 ; Bac. Abr., Tit. Trespass ; 1 Chitty Pl. 185, 11 Am. Ed. 1851 ; 5 B. & C. 485 ; 2 John. R. 191 ; 10 Ibid. 253, 369.

authority for doing. The same principle is applied to the execution of all private authorities, and to powers of appointment and revocation growing out of the statute of uses. There an excessive execution of the power does not vitiate and taint the entire act, but only so much as constitutes the excess, provided the excess can be seen and separated. The rule is thus laid down by Sugden: "Where there is a complete execution, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void, but where there is not a complete execution of a power, and the boundaries between the excess and execution are not distinguishable, it will be bad. If a man, having a power to lease for twenty-one years, lease for forty, that will be good in equity *pro tanto*, because it is a complete execution of the power, and it appears how much he has exceeded it."¹ But it seems to be a debatable question whether a court of law will support an execution of the power under such circumstances. The authorities are divided upon the point.² While such is the general doctrine relative to the excessive execution of private powers, it is believed that no case can be found where the principle has been applied to a naked statute power. In the last mentioned class of cases, the execution must be held good or bad *in toto*. There is no middle ground to be taken. The cases already cited abundantly prove that where the officer *abuses* his authority by selling more land than is necessary to pay the tax, his act is void.³

¹ Sugden on Powers, Chap. 9, Sec. 8.

² *Adams v. Adams*, Cowp. R. 651; *Campbell v. Leach*, Ambler 740; *Roe v. Prideaux*, 10 East R. 158.

³ *Ante*, 336-7; *Mason v. Fearson*, 9 Howard U. S. R. 248; *O'Brien v. Coulter*, 2 Blackf. R. 421.

But the strongest case in illustration of the doctrine, and which is placed upon invulnerable grounds, is that of *Jones v. Gibson*.¹ The facts were, that a tract of 390 acres was listed for taxation ; the land belonged to tenants in common, one of whom, before the sale, paid the tax due upon his undivided third. The law provided that unless a less quantity than the whole tract was bid for at the sale, the officer should convey to the governor for the use of the State. The law further provided, that when a less quantity than the whole should be sold, it should be surveyed and set apart to the purchaser by metes and bounds. Two years' taxes were due upon the land. The entire tract was offered for sale, and 389 acres of it were purchased by the plaintiff for the taxes in arrear. The land was duly surveyed, and a deed executed and delivered to the plaintiff, in pursuance of the sale and survey. The question was thus presented to the court of appeals, after a verdict for the defendant : "If upon these facts, the plaintiff is entitled to recover the whole of the 389 acres, or any undivided part thereof, then the verdict is to be set aside ; otherwise to stand." Seawell, J. : "There is no analogy in principle between this case and those of selling for taxes, without due advertisement ; in which cases, such sales have been held good. There, the officer did *no more than he was authorized to do* ; here he has. He has in this case sold an entire tract for taxes on the whole, when no tax was due for one-third part. He has not been satisfied with this ; but has sold for the raising of two years' taxes upon the whole, when by law, he had no right to sell at all, and which appears on the face of the deed. The

¹ Taylor's (N. C.) R. 41 ; Bat. Ed. 480.

purchaser, therefore, cannot show his title without exhibiting on the face of it an *abuse of the authority* under which the sheriff acted. But it is insisted, that so far as the sheriff *could* have sold, his sale ought to be effectuated; and cases of powers derived from *contract* have been relied on. Now it may be a general rule, that in such cases, the courts will sustain them, where they have been executed in such way, that the act which the agent had authority to do, was *properly* done, and was capable of being separated from that which there was no authority for doing. But how, in the present case, can such separation be made? The selling of the land was not in a proper manner; for the sum raised was three or four times as much as the officer had authority to demand. No one, therefore, can tell how much would have been required to raise the tax legally demandable. If this were a case of *private agency*, we therefore see no principle upon which a court could presume to collect *an intention to execute a power*; for the act done, and the effect which results from an operation of the act, if it is to have any, are as essentially different from a proper exercise of the power, as any two acts could be. In those cases of *private* powers, where the act has been done which the power authorized, though the agent may have done more — and the authorized act has been done in *such way* that it may operate *consistently* with the authority — if *innocent* persons are likely to suffer, the law has said ‘that it will *intend* from the act and *its effects*, that the agent designed to execute his authority, but has only done so in a bungling manner.’ But we think in the case of public officers, whose authority is not derived from any individual, that the law is clear *that* whenever they transcend their

authority, the whole act is void ; that the law will not for them, nor for any one else, presume they intended to act properly.¹ The sheriff therefore being a public officer, and having exceeded the limits of his authority, the whole of his act is void, and, consequently, the plaintiff cannot recover. The act of assembly under which the sheriff sold, directs him to sell to the person who will pay the taxes and charge of advertisement, for the smallest number of acres ; and if no one will pay them for less than the whole tract, to execute a deed to the governor for the use of the State. And when they are sold to an individual, the same act requires that the quantity purchased shall be separated from that not sold, by an actual survey made by the county surveyor, and the sheriff is to execute a deed accordingly. From the state of the facts, it appears impossible that the present deed can prevail to its full extent ; and by what rule or principle can its operation be directed ? It cannot, in justice, be said that it shall be confined to the two-thirds excepting one acre, because it is impossible to say how much land it would have required to raise the tax legally demandable ; and on this score it is repeated, that the purchaser by his *own deed* bears testimony against the justice, as well as legality of his claim. But if the deed is to be confined to the two-thirds, where is the excepted acre to be found ? Not in the deed ; but must require something further to be done, either by the consent of the parties, or the compulsory process of law ; such a resort is clearly at variance with what the legislature contemplated to follow from the act it authorized the sheriff to do." Still another distinction is taken by Cruise : " There

¹ *Six Carpenters' Case*, 8 Co. 144.

is a *material difference*, in *common law* powers, between a naked power or bare authority, and a power coupled with an interest. In the case of a *naked power*, if it is exceeded in the act done, it is *entirely void*. But in that of a *power coupled with an interest*, it is *good for so much as is within the power*, and void for the rest only.”¹ The power to sell land for the non-payment of a tax, is, as we have seen, a *naked power*,² and Sir Edward Sugden calls it a “common law authority.”³ It may be laid down then, as a general rule, that if a *naked power* be not pursued, the execution of it is void, both at law and in equity.⁴

¹ 4 Cruise Dig. Tit. 32, Chap. 13, Sec. 2, citing Jenk. 205.

² *Ante*, 45.

³ Sugden on Pow., Chap. 1, Sec. 1.

⁴ *Waldron v. McComb*, 1 Hill R. 111; *Clark v. Courtney*, 5 Pet. R. 319; *Taylor v. Galloway*, 1 Hammond R. 232.

CHAPTER XXIX.

OF THE COVENANTS OF THE OFFICER, CONTAINED IN THE
TAX DEED.

It is a very unusual thing for a statute to require covenants to be inserted in a tax deed, by which the State, officer or former owner, are to become bound in the event that the title of the grantee proves defective. But in New Hampshire and Vermont, the form of the deed prescribed by law, contains a covenant substantially, that the officer making the conveyance had, in his capacity as such officer, good right to sell and convey the estate, and that he would warrant and defend the same against the lawful claims of all persons. In *Gibson v. Mussey*,¹ it was held that the intention of the legislature in requiring this particular form of deed, was to make an operative conveyance of the land where the provisions of the law had been complied with, and not to bind the officer by this *involuntary* covenant; that they acted upon the assumption that the deed would not be effectual to pass the title, unless the usual common law covenants of title were inserted in it. In delivering their opinion, the court say: "That the collector is not liable upon such covenant. He is

¹ 11 Vermont R. 212.

expressly required to execute such a deed, and for the purpose of '*passing the title in law.*' It would be much more rational to hold that the deed passed the title to the land, without regard to the regularity of the previous proceedings, than to hold the collector liable on covenants which he has no option whether to omit or not. If the contract was *voluntary, and personal*, as in the case of executors or administrators, who sell land under an order of a probate court, the collector would, no doubt, be liable. But it is believed no case can be found where a public officer is required to execute a contract in a specified form, and does so execute it, that he has been holden liable on any express promise or covenant therein contained."

The case of *Wilson v. Cochran*,¹ was an action upon such a covenant, against the officer who executed the deed. It was admitted that the tax sale was illegal because of errors in the assessment, and that the grantee of the plaintiff had been evicted, and the plaintiff compelled to refund. The court rendered judgment for the defendant, remarking: "It seems to be settled, that if persons acting in *alieno jure*, voluntarily enter into covenants, no principal being bound, the party making the covenant will be bound personally, as in the case of executors, administrators and guardians. But this case is not within that rule, as the defendant has not voluntarily entered into these covenants, except so far as he may voluntarily have taken the office of collector. Having accepted the office, and made the sale for the payment of the taxes assessed, so far as it appears, in the regular performance of his duty, the statute gave him no option as to the form of the conveyance to

¹ 14 N. H. R. 397.

be executed, in pursuance of the sale. Though required to be inserted in the form of 'a personal covenant, we are of the opinion that it could not have been the intention of the legislature that the collector should be personally chargeable upon them for the full value of the land sold, or even for the amount of the consideration. The collector is a public officer, and the greater portion of the consideration goes into the public treasury. That the officer, for the small pittance of fee which falls to his share, should be required to take all the responsibility of the title, would be exceedingly strange. But the covenant, as it stands, is a good covenant of warranty against the claims of all persons; and if held to be a warranty against defects in the assessment, must also extend to all other defects in the title through which the purchaser might be evicted. The fact that the deed commences with a description of the grantor as collector, negatives the supposition that he is to assume such responsibility. It is the deed of a public officer, made in his public capacity. The covenants are not personal, but official, and the action must fail." It may be remarked that it would be extremely unjust to hold the collector responsible upon a covenant which he entered into under the *compulsion of a statute form*, for a defect in the title of the purchaser at the tax sale, growing out of the fraud, neglect or ignorance of the person who listed and assessed the land, a proceeding in which the collector took no part whatever, and who had no manner of control over the officer who did, in fact, conduct it. Whether the collector might not be responsible for his own omissions, neglect and other irregularities upon such a covenant, is undecided. No objection, however, can

be perceived to a recovery of the consideration money in such a case. Even an action on the case would lie against him, in which the purchaser, if he sustained his action, would recover the full amount of damages actually incurred. The only argument against a recovery upon the covenant is, that it is a compulsory one; the answer to which is, no one is compelled to accept an office, but if he does so, he assumes the full measure of responsibility for its faithful execution which the law has imposed upon the incumbent for the time being. Where the officer voluntarily covenants against his own acts, and for the regularity of the anterior proceedings, there is no question of his liability to the covenantee, his heirs and assigns. This is conceded in the foregoing cases, and is fully sustained by the authorities in those which are analogous in principle.

CHAPTER XXX.

OF THE CONSENT OF THE OWNER TO IRREGULARITIES IN THE PROCEEDINGS.

It may be laid down as a general rule of law, that where an irregularity—of such a character as to affect the power of the officer to sell—takes place in any part of the proceedings, and the owner of the land, being aware of the fact, is silent, and takes no steps to prevent the sale, but permits it to proceed, or even actually *consents* to waive the irregularity, a sale under such circumstances will not be recognized in a court of law. The officer derives his authority from the law, and not from the owner. He must obey the law, and not the orders of a private individual. When he keeps within the pale of his authority, minor irregularities may be cured, or waived, by the party in interest, without impairing the official character and validity of the proceedings; but the authority itself, or any substantial link in the series of acts which are necessary to establish the existence of the power, cannot be supplied or enlarged, so as to give official character and validity to acts not authorized or sanctioned by the plain provisions of the statute. This was the doctrine established by the supreme court of Alabama, in the

case of *Scales v. Avis*,¹ where the statute provided, that the collector should advertise the delinquent list three months prior to the sale; and the facts were, that the advertisement was first inserted January 4, 1843, announcing that the sale would take place February 1, 1843, and the collector, discovering his error, amended the advertisement, by changing the day of sale to April 4; but this was done after the first publication, so that the full three months' notice, required by law, was not, in fact, given. The collector notified the delinquent of the error, and the latter consented to it. The court held that the sale was a nullity, and the consent of the owner did not cure the irregularity. The same principle was applied in Kentucky, to a sheriff's sale, where the officer seized and sold more land of the judgment debtor than was necessary to satisfy the execution. This was an irregularity which, by the law of Kentucky, rendered the sale void; but it further appeared in the case, that the debtor had consented to the levy, and actually received the surplus of the sale money. The sale was declared illegal and void, and that the judgment debtor was not estopped at law from relying upon the error to defeat the title of the purchaser.² In this case, the court intimated that if the sale had any validity at all, it derived it from the individual acts and private authority of the debtor, and that, probably, a court of equity would treat the proceeding as creating a contract by way of estoppel, and compel the completion of the purchaser's title. And in *Buchannon v. Upshaw*,³ the supreme court of the United States held, that where the owner of land recognized a sale of it, made by a person who had no

¹ 12 Ala. R. 617.

² *Isaacs v. Gearheart*, 12 B. Mon. R. 231.

³ 1 Howard U. S. R. 56.

authority to sell, there was a *privity of contract* between the owner and purchaser, which a court of equity would enforce. Whether this doctrine is applicable to a tax sale, and whether a court of equity would undertake to supply a want of power in the officer, by the simple consent of the owner—substitute a private, in lieu of a public authority, to do an act—and enforce a sale of a valuable tract of land for a trifling consideration—an unconscionable bargain—has never been decided. It is predicted, however, that such a case would find but little favor in that forum; and it will be shown hereafter, that a tax sale which is void at law, can, in no conceivable case, be aided by a court of equity. No act done under a statutory power, which is void for non-compliance with the letter and spirit of the law, can be aided there. Chancery possesses no *dispensing* or *substitutional* power.

CHAPTER XXXI.

OF SALES OF LAND FOR TAXES, UNDER THE CHARTERS AND ORDINANCES OF MUNICIPAL AND OTHER CORPORATIONS.

A municipal corporation possesses no authority to levy and collect taxes upon property situated within its corporate limits, unless under an express grant from the legislative power of the State. The power to tax is one of the highest attributes of sovereignty. It involves the right to take the private property of the citizen without his consent, and without other compensation than the promotion of the public good. Such interference with the natural right of acquisition and enjoyment guaranteed by the constitution, can only be justified when public necessity clearly demands it. Being a sovereign power, it can only be exercised by the general assembly, when delegated by the people, in the fundamental law; much less can it be exercised by a municipal corporation without a further *unequivocal* delegation by the legislative body.¹ But the legislature have competent authority to delegate the power of taxation to municipal corporations, for the purpose of enabling them to carry into effect the trust committed to their charge. All lands and other property are held on the implied

¹ *Mays v. Cincinnati*, 21 Ohio R. 273; *Sharp v. Spier*, 4 Hill R. 76.

condition that they may be taxed equally for general and *local* purposes.¹ But in all cases, the corporation to whom the power is committed, must exercise it according to the principles which control the exercise of the taxing power under the constitution.² And they must conform to the mode and manner of levying and collecting the tax prescribed by the charter, which constitutes their organic law.³ They take no powers whatever by implication, unless absolutely necessary to carry into effect some power expressly delegated to them. The rule is thus laid down in *Sharp v. Spier*.⁴ "A corporation must show a grant, either in terms or by necessary implication, for all the powers which it attempts to exercise; and especially must this be done when it claims the right, by taxing or otherwise, to divest individuals of their property without their consent. The exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation. The power to sell is a high prerogative power." The power is a limited one,⁵ and must be strictly construed and pursued.⁶ Thus, although the State may resort to summary proceedings to collect a tax, by imprisoning the body, or selling the goods or lands of the delinquent, it is otherwise with a corporation, unless there is an express grant in their charter. By the common law, corporations cannot make a by-law to enforce the payment of taxes, by warrant to distrain and sell the

¹ *Cheaney v. Hooser*, 9 B. Mon. R. 330; *Talbot v. Dent*, *Ibid.*; *Hope v. Deaderick*, 8 Humphrey R. 1.

² *Hope v. Deaderick*, 8 Humphrey R. 1; *Fitch v. Pinckard*, 4 Scam. R. 69.

³ *Mack v. Jones*, 1 Foster R. 393; *Dillingham v. Snow*, 5 Mass. R. 547; *Stetson v. Kempton*, 13 *Ibid.* 272.

⁴ 4 Hill R. 76.

⁵ *West School District of Canton v. Merrills*, 12 Conn. R. 431; *Kemper v. McClelland*, 19 Ohio R. 324.

⁶ *Nicholl v. Nashville*, 9 Humphrey R. 252.

goods and lands of a party who has neglected to pay his dues. When the taxes are legally assessed, they become a debt due to the corporation, and if not paid, must be recovered in due course of law.¹ An action of assumpsit is the appropriate remedy to recover the tax, in all cases where the charter is silent as to the mode of collection.² And where express power was conferred upon a town corporation, to levy taxes and sell land for the non-payment of them, but the charter was silent as to the power of the corporation to convey the land sold to the purchaser at the sale, it was held that the power of conveyance could not be exercised by the town. 1. Because a corporation can exercise no implied powers. 2. Because such a power is in derogation of the common law; and, 3. The power to sell does not include the power to convey.³ Again, a municipal corporation has no authority, except by express grant, to exempt any property within its corporate limits, from taxation.⁴ Such a power can neither be exercised by means of a general ordinance, exempting a particular class of property, nor by means of a stipulation in a grant or conveyance, transferring a parcel of land owned by the corporation.⁵ Nor has a municipal corporation the power to declare that the collector's deed shall be conclusive, or even *prima facie* evidence of a compliance with all the prerequisites of the ordinance, providing for the sale of lots within the town or city limits for the non-payment of taxes due and unpaid thereon. The legislature alone possesses the power

¹ *Bergen v. Clarkson*, 1 Halstead R. 352.

² *Mayor v. Howard*, 6 Har. & John. 383; *Dugan v. Mayor*, 1 Gill & John. 499.

³ *Doe v. Chunn*, 1 Blackf. R. 336.

⁴ *Fitch v. Pinckard*, 4 Scam. R. 69; *Mack v. Jones*, 1 Foster R. 393.

⁵ *Fitch v. Pinckard*, 4 Scam. R. 69; *Mack v. Jones*, 1 Foster R. 393.

to make and alter rules of evidence.¹ Corporation taxes can in no sense be regarded as public taxes, within the meaning of any general law of the State. They are local to all intents and purposes, and special in their character. Therefore no general law, regulating the taxing power of the State at large, can be construed in any given case as embracing taxes levied by such corporations. Upon this principle, it was held in *Shoalwater v. Armstrong*,² that a general statute declaring a tax deed made in pursuance of a sale for "*public taxes*," *prima facie* evidence of conformity with the requisitions of the law, and authorizing the respective collectors to make a report of the delinquent list to, and apply for a judgment thereon in the circuit or other court of their respective counties, did not apply to taxes assessed by, and due to, a municipal corporation. It is said to be "a principle of common justice that the same property should not be twice burdened for the same tax; and, consequently, in construing general powers, bestowed on towns and cities to impose taxes, a construction ought not to be given which would subject the property of any individual or corporation, to double taxation, unless required by the express words of the statute, or by necessary implication."³ Where, by charter, a municipal corporation is authorized to assess taxes "*according to law*," the general law regulating taxation is intended; and the general law in force at the time of the assessment and collection of the tax, is the law by which the corporation is to be controlled in the exercise of the power granted, and not the one in force at the time of the enactment of the charter.

¹ *Fitch v. Pinckard*, 4 Scam. R. 69.

² 9 Humphrey R. 217.

³ *Bank of Georgia v. Savannah*, Dudley R. 132, citing 10 Mass. R. 514; 17 Ibid. 461.

Such a construction ought not to be placed upon the charter, as would prevent the corporation from participating in the improvements of the system of taxation which may be made, from time to time, by the laws of the land.¹ The corporation possesses no power, either to assess a tax not authorized by charter, nor to change or modify the public laws of the land, regulating the taxing power.² And it is presumed, that when the charter is silent as to the principles, mode and manner of taxation, the analogies to be drawn from the general statutes of the State, in relation to the taxing power, ought to be adopted by the corporation, in the execution of their local power of taxation.³ Such are the general principles to be extracted from the adjudged cases, relative to the nature, extent, and mode of exercising the taxing power, by municipal corporations.

In deducing title, under a sale for taxes, made in pursuance of the charter and ordinances of a city or town corporation, it is necessary for the purchaser, or those claiming under him, to prove, (unless by charter the tax deed is made *prima facie* evidence of title)

1. The existence of a corporation, by evidence of the charter and its acceptance by the inhabitants. The charter may be proved by an exemplification of it under the great seal of State, or the production of the printed statute book containing it; or if, by the charter, it is made a public act, the courts will probably take judicial notice of it. The corporation records, showing an organization under, and acts done in pursuance of, the charter, will be evidence of its

¹ *Ontario Bank v. Bunnell*, 10 Wend. R. 186.

² *Mack v. Jones*, 1 Foster R. 393.

³ *Doe v. Chunn*, 1 Blackf. R. 336; *Mack v. Jones*, 1 Foster R. 393.

acceptance by the inhabitants;¹ and, 2. A strict compliance with all of the requirements of the charter and ordinances in force at the time the proceedings took place, and under which they purport to have been made.² What provisions of the charter and ordinances are to be regarded as peremptory requirements, depends upon the same general principles discussed in the other chapters of this work. If there is any difference between sales for taxes, made under the general laws of the State, and those made in pursuance of the charter and ordinances of a municipal corporation, the strictness required in the latter is greater than in the former class. It may be added, that no instance is known where a corporation tax sale has been maintained by the courts.

There are instances of tax sales made under a power contained in the charter of a *private* corporation, which it may be proper to notice in this connection. On April 15, 1803, the legislature of Ohio, incorporated "the proprietors of the half million acres of land lying south of Lake Erie, called sufferers land," for the purpose of enabling the proprietors to extinguish the Indian title to their lands, to cause them to be surveyed, and to make partition among themselves. Along with other special powers conferred upon the corporation, the charter of Ohio provided, "that to defray all necessary expenses of said company, in purchasing and in extinguishing the Indian claim of title to the land, surveying, locating

¹ *Fitch v. Pinckard*, 4 Scam. R. 69.

² *Fitch v. Pinckard*, 4 Scam. R. 69; *Shoalwater v. Armstrong*, 9 Humphrey R. 217; *Doe v. Chunn*, 1 Blackf. R. 336; *Ronkendorff v. Taylor*, 4 Peters R. 349; *Corporation of Washington v. Pratt*, 8 Whea. R. 686; *Mason v. Fearson*, 9 Howard U. S. R. 248.

and making partition thereof, as aforesaid, and all other *necessary expenses* of said company, power be, and the same is hereby given to, and vested in, the said directors and their successors in office, to levy a tax, or taxes, (two-thirds of the directors present agreeing thereto,) on said land, and have power to enforce the collection thereof." And it was further provided, "that all sales of rights, or parts of rights, of any owner or proprietor in said half million acres of land, made by the collector, shall be good and valid, so as to secure an absolute title in the purchaser; unless the said owner and proprietor shall redeem the same within six calendar months next after the sale thereof, by paying the taxes for which the said right or rights, or parts thereof, had been sold, with twelve per cent. interest thereon, and costs of suit." It was also provided, "that said directors shall have power and authority, and the same is hereby given to them and their successors, to do whatever shall to them appear necessary and proper to be done, for the well ordering and interest of said owners and proprietors, not contrary to the laws of the State." And it was further provided, that "supplies of money which shall remain in the hands of the treasurer, after the Indian title shall be extinguished, and said land located, and partition thereof made, shall be used by said directors for the laying out and improving the public roads in said tract, as this assembly shall direct." The act contained no provision in favor of the rights of infants or *femes covert*. In 1806, the legislature of Ohio levied a tax upon the lands of this corporation, and declared it a perpetual lien. On May 5, 1808, the directors assessed a tax upon each share holder in the corporation, for the purpose of defraying the

State tax, levied as aforesaid, and other necessary expenses of the corporation. In *Beatty v. the Lessee of Knowler*,¹ the lessors of the plaintiff, in error, were infant share holders in the corporation aforesaid, and their interest in the lands of said corporation were sold, under the charter and vote of said corporation, to pay the assessment aforesaid. The defendant below claimed under this sale. The circuit court instructed the jury, that the directors of the corporation had no power to assess said tax, and that the infant lessors were not concluded by such assessment. The jury found a verdict accordingly, and the defendant prosecuted a writ of error from the Supreme Court of the United States, where the judgment was affirmed. The court based their decision upon these grounds: that the power to impose a tax on real estate, and sell it, in case of a failure to pay the tax, was a *high prerogative*, and should never be exercised where the right was doubtful; that there was no *express* power to assess a tax for the purpose of discharging that levied by the general law of the State; that it could not be *implied* from the language of the charter, authorizing the levy of a tax "to defray all *necessary expenses* of said company;" on the contrary, it clearly appeared that it was not the intention of the legislature to look to the *corporation* for the payment of the tax assessed under the general law, but to the *land itself*, for the law declared the tax a lien upon the land.²

¹ 4 Peters R. 152.

² Inasmuch as this case is the only one of any importance, which illustrates the nature and extent of the taxing power, conferred upon *mere private* corporations, it is deemed appropriate to set forth the reasons of the court at large. Judge McLean delivered the opinion of the court in these words: "It is not contended, in this case, that this company could derive corporate power to do any act in Ohio in relation to the sufferers' land, under the statute of Connecticut. All their powers must be derived from the law of Ohio. This law, it is insisted, is a private act, not designed for public purposes, and consequently cannot

The case of *Thompson v. Gotham*,¹ involved the validity of a tax title derived from the same source

affect the rights of any individual who did not assent to its provisions; that the provision declaring it to be a public act, does not alter the principle, for the rights described under it are of a private nature, being limited to those who have an interest in the land; and it is denied that any evidence of assent has been shown by the lessors of the plaintiff, or their ancestor. Several authorities were cited, as having a bearing upon the objections thus stated. The names of the sufferers are published in the Connecticut act or resolution in 1792, with the amount allowed to each, as his indemnity for losses sustained. In this act is found the name of the ancestor of the lessors of the plaintiff. His right descended to them, subject to the same conditions by which it was originally held. The provisions of the law of incorporation, that it should be considered a public act, must be regarded in course of justice, and its enactments noticed, without being specially pleaded, as would be necessary if the act were private. That a private act of incorporation cannot affect the right of individuals who do not assent to it, and that in this respect it is considered in the light of a contract, is a position too clear to admit of controversy. But, in the present case, this objection seems not to have been made in the court below, where proofs of the assent, if necessary, might have been submitted to the jury. From the nature of the right asserted, and the circumstances under which it was originated, this court cannot doubt that the assent of the proprietors may be fairly presumed, both to the act of Connecticut, and to that of Ohio. Rights have been protected and regulated under those laws, and to the provisions of the latter are the claimants indebted in a great degree, for the present value of the remainder of the land, which they still hold; and, as has been well argued, if they participate in the benefits of the law, they can set up no exemption from its penalties. The main question in the case is, whether the directors have the power, under the act of incorporation, to assess a tax on each proprietor's share, to pay a tax to the State. That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it, will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation. In the second section of the act, power is given to the directors to extinguish the Indian title, under the authority of the United States when obtained; to survey and locate the land into townships, or otherwise to make partition; and to defray all necessary expenses in carrying these objects into effect; and to meet these and 'all other necessary expenses of said company;' the directors are authorized to levy a tax or taxes on said land, and to enforce the collection thereof. As the power to tax for the purpose of paying a tax to the State, is not found among the enumerated powers of the directors, it must be derived, if it exists, under the words 'all other necessary expenses of said company;' or under the tenth section, which provides 'that the directors shall have the power to do whatever to them shall appear necessary and proper to be done, for the well ordering and interest of the proprietors, not contrary to the laws of the State.' In favor of this construction, it has been ingeniously argued, that partition not having been made of the land, it could not be entered for taxation, as required by the law of the

¹ 9 Ohio R. 170.

as that litigated in the preceding case. The defendant, who set up the tax title, proved a legal levy of

State. That the half million of acres must be entered on the duplicate of the collector as one tract, and that it would be impracticable for the collector to ascertain and collect from each proprietor his just proportion of the tax. That many of the proprietors are non-residents, and that any proportion of them, being desirous of paying their part of the tax, would not be discharged by doing so; as a part of the entire tract, involving their interests, would be liable to be sold for any balance of the tax which remained unpaid. Whether partition was made of the land when the directors assessed the tax, does not appear, nor is it considered a fact of much importance in the case. No argument drawn from convenience can enlarge the powers of the corporation. Was the tax imposed, a 'necessary expense of said company,' within the meaning of the act? That these words would cover the expense of necessary agents to assess and collect a tax legitimately imposed by the directors, is clear, and also other incidental expenses, arising from carrying into effect the powers expressly given; but do they invest the directors with a new and substantive power? If they do, how is the exercise of the power to be limited? Must it depend upon the discretion of the directors to determine all necessary expenses of the company? Ample provisions are found in the State law imposing a land tax, for the assessment and collection of the tax. A lien is held on all the taxable land in the State, whether entered for taxation or not; and if the tax should not be paid by a time specified, the collector was authorized, after giving notice, to sell the smallest part of the tract which would bring the amount of the tax. For the convenience of non-residents, district collectors were appointed, who were required to hold their offices at places named in the act. The collector for the district including the sufferers' land, held his office at Warren, within what is called the reservation of Connecticut. The law imposing the tax operates upon the land in controversy, and raises a lien, the same as on any other taxable land in the State. It appears, therefore, that it was not the intention of the legislature to look to the corporation for the payment of the tax assessed under the law, but to the land, as in all other cases. And if any part of the land has been sold by the State, in which minors had an interest, under the law, they had a right to redeem it within a year after they became of age. This is an important provision, and is not contained in the act of incorporation. The agents of the State were paid for their services out of the tax collected; those of the corporation by the company. It would seem, therefore, that the tax collected by the State would be less expensive to the proprietors than if collected by their own agents, and less hazardous to their rights, as the interests of the minors were protected. If, therefore, the argument drawn from convenience could have any influence, it could not operate favorably to the power of the directors. The power to impose a tax on real estate, and to sell it where there is a failure to pay the tax, is a high prerogative, and should never be exercised when the right is doubtful. In the preamble to the Ohio act of incorporation, there is a reference to the Connecticut act and to the cession of the reserve, by that State, to the Union, and a statement that it was annexed to the State of Ohio. And as a reason for the passage of the act, it is stated that said 'half million of acres of land are now within the limits of Trumbull county,

the tax, the appointment of a collector, and his qualification, and also a deed from the collector, which recited the charter of the corporation, the assessment of the tax, the default of the owner, the order of sale, the notice of sale, and the sale itself. The circuit judge charged the jury that the tax title was invalid. A verdict and judgment was thereupon rendered for the plaintiff. The defendant moved for a new trial, which motion was overruled by the Supreme Court,

in said State, and are still subject to Indian claims of title; wherefore, to enable the owners and proprietors of said half million acres of land, to purchase and extinguish the Indian claim of title to the same, (under the authority of the United States, when the same shall be obtained,) to survey and locate the said land, and to make partition thereof to and among said owners and proprietors, in proportion to the amount of land which is or shall be by them respectively owned,' &c. These are the objects to be accomplished by the act of incorporation, and which could not be attained by the individual efforts of the proprietors. In the eleventh section of the act, it is provided, 'that supplies of money which shall remain in the hands of the treasurer, after the Indian title shall be extinguished, and said land located and partition thereof made, shall be used by said directors for the laying out and improving the public roads in said tract, as the legislature should direct.' From a careful inspection of the whole act, it clearly appears that the incorporation of the company was designed to enable the proprietors to accomplish specific objects, and that no more power was given than was considered necessary to attain these objects. The words 'all necessary expenses of the company,' cannot be so construed as to enlarge the power to tax, which is given for specific purposes. A tax to the State is not a necessary expense of the company, within the meaning of the act. Such an expense can only result from the action of the company in the exercise of its corporate powers. The provision in the tenth section, that the 'directors shall have power to do whatever shall appear to them to be necessary and proper to be done, for the well ordering of the interest of the proprietors, not contrary to the laws of the State,' was not intended to give unlimited power, but the exercise of a discretion, within the scope of the authority conferred. If the words of this section are not to be restricted by the other provisions of the statute, but to be considered according to their literal import, they would vest in the directors a power over the land, only limited by their discretion. They could dispose of the land and vest the proceeds in any manner which they might suppose would advance the interest of the proprietors. It is only necessary to state this consequence, to show the danger of such a construction. The restrictions imposed in other parts of the statute, very clearly demonstrate that it was not the intention of the legislature to invest the directors with such a power. Upon a full view of the various provisions of the act of incorporation, the court do not find a power given to the directors to assess a tax, as has been done, in the case under consideration, to pay a tax to the State."

upon the ground that there was no proof that the sale was advertised in conformity with the charter and ordinances of the corporation — that such notice was a prerequisite to the validity of the sale — that the *onus* was upon the defendant to prove the fact — that the recital in the deed was not evidence in his favor.

There is another class of tax titles somewhat analogous to those derived under the charter of the corporators and shareholders in the "Sufferers' tract." In the early settlement of the New England States, it was usual for the legislatures of the several colonies, to grant a township, or other large body of land, to a number of proprietors, or grantees, in fee, to hold as tenants in common. These tenants in common were created *quasi* corporations, with power to manage their common lands. They were authorized to assess taxes upon each share and collect the same, for the purpose of improving the estate and paying off incidental charges. Each share was liable for the tax assessed against its proprietor, and the corporators, or the major part of them, had power to sell and convey, through the agency of a committee or single officer, appointed for the purpose, in case the proprietor, against whom the tax was assessed, proved delinquent. The *modus operandi* of the proceeding was to warn a meeting of all the proprietors, under a warrant from a justice of the peace, or in some other manner, according to the particular statute under which the power was conferred, and the meeting voted a tax upon the whole tract held in common, and apportioned it according to the interest of each tenant; notice was then given to pay the tax; in case of default, the meeting appointed a committee, or single person, to sell and convey, first giving notice by a publication

in a newspaper or by posting in public places, and sometimes in both ways. Other provisions of an immaterial character, were to be found in the laws under which the proceeding took place. The courts adopted the same principles in testing the validity of these titles, which have been applied in the construction of similar laws in other States. The *strict* rule was adopted, and the *onus probandi* cast upon the party claiming under the tax sale. However, after a great lapse of time, it became difficult to prove the legality of the meetings which levied the tax and authorized the sale and conveyance, and the records of the sale were imperfectly kept; and in support of a long possession, the courts were liberal in construing the acts of the proprietors, and those who sold and conveyed, and many presumptions were indulged in for the purpose of sustaining these ancient titles. Where, however, the proceedings affirmatively appeared upon the face of the conveyance to be illegal, the sales were held void. This general statement, and a reference to the cases, is deemed sufficient for the information of all concerned in this class of titles.¹

¹ 2 Dane Abr., Chap. 68, Art. 4, Sec. 5; Sullivan on Land Titles, 116, 121; *Bolt v. Perley*, 11 Mass. R. 169; *Farrar v. Eastman*, 5 Greenl. R. 345; S. C., 1 Fairfield R. 191; *Porter v. Whitney*, 1 Greenl. R. 306; *Inman v. Jackson*, 4 Greenl. R. 237; *Farrar v. Perley*, 7 Ibid. 404; *Wentworth v. Allen*, 1 Tyler R. 226; *Decker v. Freeman*, 3 Greenl. R. 338.

CHAPTER XXXII.

OF THE FORFEITURE OF LANDS TO THE STATE, WHERE THE
TAXES HAVE NOT BEEN PAID.

THE omission or neglect of a duty which the party binds himself to perform, or to the performance of which he is enjoined by the law, is, upon the breach or neglect thereof, called a forfeiture; that is, the advantages accruing from the performance of the thing are defeated and determined.¹ It is a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained.² These definitions include forfeitures of conditions, obligations, offices, and estates, and other penalties accruing in civil cases, or inflicted for transgressions or omissions of duty imposed by the criminal laws of the land.³ Forfeitures for crime have been abolished in this country. But the common law rule in relation to the forfeiture of estates for breaches or the non-performance of condi-

¹ Bac. Abr., Tit. *Forfeiture*; *Beard v. Smith*, 6 Munroe R. 444.

² 2 Bl. Com. 267.

³ *Beard v. Smith*, 6 Munroe R. 444.

tions annexed to them — those forfeitures arising upon an alienation of a greater estate than a tenant for life or for years, has in the land, and those for the commission of waste by the tenant of a less estate than a fee simple — is of constant application in our system of jurisprudence. To these may be added such forfeitures as are declared by *statute*, for the non-performance of some duty imposed upon the owner of an estate.¹ It is a familiar principle, that a court of equity will not lend its aid to enforce a forfeiture, but on the contrary will relieve against them in many cases. Even a court of law does not favor a forfeiture, and requires strict proof of the act or omission upon which it is claimed. In many States, forfeitures for the neglect of the owner of an estate to list his land, or pay the tax assessed upon it, have been directed by the legislature. This class of forfeitures are based upon the principle that every owner holds his estate upon the *implied condition* that he will furnish a list of his taxable estate, and promptly pay his share of the common burdens assessed against the entire community; and if he omits to comply with the *CONDITION*, and his estate is offered at public vendue, and no purchaser can be found for it, the title is transferred from the owner to the State, the latter being always ready to bid for the land, when no other bidder appears. The mode of declaring the forfeiture varies according to the caprice of each State. In some instances, the words of the statute are, that he shall “forfeit” his estate to the commonwealth for non-compliance with the duty or duties imposed upon him. In others, the law declares that the land of the negligent owner shall

¹ *Beard v. Smith*, 6 Munroe R. 430.

be stricken off to the State, or to the governor, for the use of the State. In all cases which have come under the observation of the writer, ample provision is made for a redemption, by the owner of the estate. It may be laid down as a principle of universal law, that in order to enforce these forfeitures, the courts require the same degree of strictness which is applied to ordinary tax sales, in order to divest the title of the owner. Where the land, instead of being struck off to the State as a bidder at the tax sale, is declared to be "forfeited to the State," or equivalent language is used, it is a serious question whether an *inquisition* is not necessary, in order to divest the title of the rightful proprietor and vest it in the State. It is a maxim of the common law, that the words "shall forfeit," vest in the king a simple right to enforce the forfeiture upon office found, and not the freehold in deed or in law.¹ "These inquests of office," says the learned author of the commentaries upon the laws of England, "were devised by law as an authentic means to give the king his right by solemn matter of record; without which he, in general, can neither take nor part from any thing. For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon and seize any man's possessions upon bare surmises, without the intervention of a jury."² This reason is equally applicable to our government, as to a monarchy; or, rather, in a government founded upon the principles of liberty, the reason is stronger than in any other. Lord Coke says that in all statutes declaring forfeitures, "it is intended upon office found; *incidents* are ever supplied by intendment."³ The same

¹ Dwarries' Stat. 743; Flowden, 486.

² 3 Bl. Com. 259.

³ 2 Inst. 221.

doctrine is maintained in *Dowie's Case*,¹ and in *Page's Case*.² And it was recognized and applied by the Supreme Court of the United States in *Fairfax v. Hunter*.³

The Virginia statute of 1790 provided "that in case the tax upon any tract of land shall not be paid for the space of three years, the right to such land shall be *lost, forfeited, and vested in the commonwealth*; and it shall be lawful for any person to acquire a title to such land so forfeited, in the manner prescribed for acquiring titles to waste and unappropriated lands in the act of 1785, c. 42." The manner of acquisition prescribed by the recited act, was by paying the purchase money into the land office, upon which a warrant was directed to issue in the name of the purchaser; under this warrant a location and survey was directed, and upon the return of the warrant and survey, a patent was to be issued to the locator. Infants, *femes covert*, and persons *non compos*, were allowed three years to redeem, and thus save the forfeiture. The law further required a listing of the land, a return of the list, and a publication of the delinquency of the owner. In *Kinney v. Beverly*,⁴ the latter, who was the original proprietor of the land, under a grant from the commonwealth, brought an action of ejectment against Kinney, who claimed under a warrant and survey, and patent of land forfeited under the above recited act of 1785. A special verdict was found, that the land had never been valued by the listers, that the list had never been returned, and that the delinquency of the owner was not advertised. Nor did it appear that the title had been vested in the commonwealth by means of an

¹ 3 Co. R. 10.

² 5 Co. R. 82.

³ 7 Cranch R. 603.

⁴ 2 Hen. & Munf. R. 318, 344.

inquisition, or in any other manner, except by force of the statute. All of the judges agreed upon a judgment in favor of Beverly, because 1. The land was not valued ; 2. The list was never returned ; and, 3. The land was not advertised. But Tucker went further, and held an inquisition necessary, saying : “ I have always considered that, from the period of our revolution, the commonwealth succeeded to the *political character* of the king, in all cases whatsoever ; and that its rights, privileges, and remedies were to be in general, ascertained by the political character of the king, where the same were not controlled or enlarged by the express terms of the constitution, or the clear and definite provisions of some statute of the commonwealth. On this ground, I have held that the commonwealth could neither take nor grant anything, except by matter of record.” (He then cites Blackstone and Coke, and proceeds.) “ The conclusion which irresistibly presses itself upon my judgment is, that previous to any grant or location thereof, there must be some further inquiry made ; and, as at present advised, that this must be done, either by an inquest of office, or *some other mode* to be provided for by the legislature, whereby the certainty of the lands may be shown, and the seizin, as well as the right vested in the commonwealth. A further reason in support of this opinion arises from that principle of *moral justice*, recognized by *Magna Charta* in England, and by our constitution, whereby it is declared that no man shall be disseized of his freehold or be condemned, but by the lawful judgment of his peers, or by the law of the land ; the meaning and intention of which is, that no man shall be deprived of his property, without being first heard in his own defence.

In the case before us, the plaintiff has been disseized of his lands, and they have been granted over to a third person, without notice or warning whatsoever."¹ The same doctrine was maintained in *Robinson v. Huff*,² The facts sufficiently appear in the following opinion of the court: "This is an ejectment, in which the lessor of the plaintiff below gave in evidence a title derived from the Commonwealth. The defendant then gave in evidence a patent of elder date, granted to Banks and Claiborne, who were strangers to this controversy, covering the contested premises. To avoid the effect of this, the plaintiff produced and read a certified extract from the book of the auditor of public accounts, showing that the claim of Banks and Claiborne was sold to the State for taxes, in 1806, and never redeemed. The court below, then, at the instance of the plaintiff, instructed the jury, that the legal title to the land claimed by Banks and Claiborne was vested in the Commonwealth by the said sale, and that the elder legal title to the land in controversy was of course in the lessors of the plaintiff. The defendant below excepted to this instruction, and a verdict and judgment having been rendered against him, he has appealed to this court, and relies on this instruction as error. It may be a question of some moment, how far the purchase of the claim of Banks and

¹ Upon this point, Judge Roane gave a contrary opinion, making use of the common argument in favor of summary proceedings, in collecting the revenue. He says: "I cannot for a moment doubt the power of the legislature to pass the law in question; nor can I think that, under the influence of that power, and the actual provisions contained in that law, there is any pretense to say, that locations under the act must be preceded by inquisitions of office. Such a construction would defeat the great end and object of our acts, in this particular; would greatly affect our revenue; and can only gain color by giving to the principles of the common law, in respect of inquisitions, a supremacy over the positive acts of the legislature."

² 3 Litt. R. 38.

Claiborne by the government could receive or infuse validity into the title of the lessor of the plaintiff, and whether the right of entry would not pass exclusively to the State. But we do not suppose it necessary to inquire into that question now; for we are of opinion, that the sale for taxes to the State did not pass the legal title. It is a well known rule of the common law, that no freehold might be given to the king, nor derived from him, but by matter of record.¹ In conformity with this principle, the Supreme Court of the United States, in the case of *Fairfax's Devisee v. Hunter's Lessee*,² decided that the statutes of Virginia, which showed a strong intention in the legislature to take and pass the title of real estate without inquest of office, were insufficient for that purpose, without express provision to that effect. No doubt this principle applies to our Commonwealth as it did to the Crown, and it is doubtless a common law rule subject to the control of the legislature; but it is necessary that it should be clearly changed before we can disregard it. The tract of land in question was sold in pursuance of the provisions of an act of 1806.³ Before that time, the sheriffs and register could only sell to individuals, and the State was not allowed to bid. Deeds of conveyance were to be executed by these officers before the title could pass to the individuals. The act in question barely let in the State as a purchaser or bidder at the register's sales, as to all tracts which could not be sold to others, for the arrearages of taxes due. These were to '*be stricken off to the State.*' Whether the register, in case such tracts were not redeemed, was bound to convey them to the State, as to other pur-

¹ 2 Bl. Com. 344.² 7 Cranch. R. 603.³ 3 Litt. Stat. 335.

chasers, to furnish such record as would pass the title, or, whether further legislation was necessary, to place the title in the State, we will not now inquire; for there is no pretension of any record here, by which the State could take the title, except the entry on the books of the auditor, to whom the register was bound to return an account of the sales. We discover no provision directing the auditor to record these returns. We do not scruple the power of the legislature to have made the auditor's books, or even these returns of the register, sufficient to pass the title. But still it was necessary that they should make such provision, before we can say that they intended to affect the common law principle. As such provision is wanting, we cannot say that the State took the legal estate. Of course, the instruction of the court below, which assumed the position, that this sale, so evidenced, took the legal title from Banks and Claiborne, and passed it the State, so as to render it inoperative against the junior grant of the lessor of the plaintiff, was erroneous."

The Kentucky statute of 1801,¹ provided, that "any person, (infants and persons *non compos mentis* excepted,) claiming lands in this State, and failing to list the same for taxation, in the case of a resident, when legally called upon by a commissioner of the tax, and in the case of a non-resident, with the auditor, on or before the first day of October next, shall, for and in consequence of such failure, *forfeit* his or her claim to the commonwealth." In *Barbour v. Nelson*,² it appeared that the plaintiff, who sued for a tract of land containing sixty thousand acres, had failed to list it for taxation, as required by the law.

¹ 2 Litt. Stat. 463.

² 1 Litt. R. 60.

Whereupon the circuit court instructed the jury, that "the title was forfeited to the Commonwealth, and the title thereof and right of entry, was thereby divested out of Barbour; and that, without an inquest of office, the certificate of the auditor, showing that the land had not been entered for taxation, was sufficient to show that the plaintiff had no title." The court of appeals reversed a judgment rendered in pursuance of the foregoing instructions, saying: "If, by the operation of this statute, the title to lands is divested out of non-residents, immediately on a failure to comply with its requisitions, in entering them for taxation, the instructions of the court below are correct; but if, before the title vests in the Commonwealth, the failure to enter the lands for taxation should be ascertained by an office of inquisition, then, as no such inquisition appears to have been taken, as to the land patented to Barbour, the instructions of the court cannot be sustained. That there must be an office of inquisition, before the title vests in the Commonwealth, will be apparent, if those rules of construction be applied which have invariably governed the English courts, in expounding their acts of parliament, declaring forfeitures to the king. Thus, it has been held, where a man is attainted by parliament, and it is thereby ordained, that all his lands shall be forfeited, and it is not said, that they shall be in the king without office, there they shall not be in the seizin of the king, to grant over, without office, for it does not appear of record what lands they are.¹ And while speaking on the subject of inquests of office, Blackstone, in the third volume of his Com-

¹ Broke, title *Office*, cited and recognized in 2 Plowden, 486, and 3 Coke Rep. 10.

mentaries, observes: 'These inquests of office were devised by law as an authentic means to give the king his rights by solemn matter of record; without which, he, in general, can neither take nor part from anything.' And the reason assigned is, that 'it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon, or seize any man's possession, upon bare surmises, without the intervention of a jury.' Other authorities, to the like import, might be cited; but these are sufficient to show that in general, the king can take nothing but by matter of record, and that there must be an inquest of office to entitle him to forfeited lands, unless the statute declaring the forfeiture, declares the title to be in him *without office*. If therefore, those rules to which we have adverted are to have any influence on the construction of the statute of this country, it is obvious that, before office found, the Commonwealth cannot be vested with the title to lands not entered for taxation; for the statute barely declares, that the person failing to enter his lands shall *forfeit* his claim to the Commonwealth, without containing any expressions from which it can be inferred that the legislature intended to dispense with the inquest of office. It is true, in the proviso to the statute, there is not only a saving of the rights of others, but it is declared, also, that such rights shall be and remain as valid and secure, as if the claim which has been forfeited had never existed; but that proviso, we apprehend, ought not to induce a construction more unfavorable to the forfeited claim than would have been proper without it. Under that proviso, it would no doubt be impracticable for a purchaser of a forfeited claim, after

office found, to overreach an adverse title, derived from the Commonwealth, junior in date to that which had been forfeited, and which existed at the time of the forfeiture ; but as, without the proviso, the Commonwealth could not be vested with the forfeited title without office, so under the proviso, those having adverse titles ought not to be allowed to set up the forfeiture to protect their title until by inquest of office, the title is divested out of the person failing to enter it for taxation. And with respect to the application of those rules of construction to the statutes of this country, we are utterly unable to perceive any solid objection. The king, in his political character, is nothing more nor less than policy and government, constituted for the direction of the people ; and by the change of government, produced by the revolution, the Commonwealth of necessity has succeeded to that political character. There is an obvious propriety, therefore, in ascertaining the rights and remedies of the Commonwealth, in the general, by the standard of the common law, as respects the political character of the king, where the same are not varied by the terms of the constitution or some statutory provision."

It will be perceived, upon a careful examination of the foregoing opinions, that the common law rule which requires an inquest of office, is applicable to the case of lands forfeited to the State for the continued delinquency of the owner, unless it has been changed by the positive provision of the statute ; that the rule will not be considered as changed, unless the words of the act are clear and explicit ; and that the opinion of Judge Tucker is, that a law positively dispensing with the inquisition, is a violation of that principle

of constitutional law which declares "that no man shall be disseized of his freehold, but by the judgment of his peers, or the law of the land." It must be confessed that, if at common law an inquisition was requisite to vest title in the government, in this class of cases—and this seems to be admitted by Coke and Blackstone—it is difficult to perceive why the term, "law of the land," should not be construed in this country under our constitutions, according to the interpretation given to *Magna Charta*. The fact of a failure to list, and the location of the land in the one case, and the non-payment of the tax and description of the land in the other, ought to be ascertained judicially, and not left to the determination of the auditors or listers. There ought to be some higher evidence of title in the government than a mere certificate or return of a ministerial officer. It will also be seen that this inquisition is essential even where the State becomes the purchaser of the land by bidding at the sale, upon the ground that the delinquency of the owner—the fact that there were no other bidders—and the designation of the land must be ascertained judicially. However, it does not very clearly appear why the State may not stand upon the same footing with other bidders at the sale, unless it is because of the anomalous implication, that the officer of the State, may convey to the State the land of another, and act as the agent of the State in the double capacity of auctioneer and bidder. This difficulty is obviated in North Carolina, Ohio and Illinois, by express statutes. In the former State, if no one bids at the sale upon a less quantity than the whole tract offered, the governor is regarded as a bidder for the entire parcel, and the officer conduct-

ing the sale is required to execute and deliver to the governor, for the use of the State, a deed for the same.¹ In Ohio, it has been the universal practice, under the statutes passed from time to time, for the officer to strike off the lands unsold to the State, and they were regarded as redeemable until the legislature took some steps to dispose of them. After a considerable accumulation of such forfeited lands in the hands of the State, the legislature have authorized them to be disposed of at public vendue, either by the State auditor, who was required to advertise the time and place of sale, or that officer was directed to send a transcript of the list to the auditor of the county in which the lands lay, and the latter was directed to advertise and sell them as in ordinary cases.² The statute of Illinois³ declared that "every tract of land or town lot offered for sale by any collector, as herein before provided, and not sold for want of bidders, shall be, and the same is hereby declared to be forfeited to the State of Illinois, and thenceforth all right, title and claim of the former owner or owners, shall be considered as transferred to, and vested in the State." The statute allowed owners laboring under no legal disabilities, two years to redeem, and infants, married women and lunatics, one year after their disabilities were respectively removed, upon payment to the county clerk of double the amount for which the land was sold, all taxes subsequently accruing, and six per cent interest. The clerk was required to transmit a list to the auditor, of lands redeemed, semi-annually. The auditor was directed to furnish, in turn, to the clerk, a list of all

¹ *Register v. Bryan*, 2 Hawkes R. 17; *Jones v. Gibson*, Taylor N. C. R. 41.

² *Buckley v. Osborn*, 8 Ohio R. 180; *Hannel v. Smith*, 15 Ohio R. 134.

³ R. S. 1845, pp. 448, 450; Secs. 77—90.

lands lying in his county, which had been forfeited to the State; and the clerk was authorized to advertise and sell the same biennially. The sheriff was required to assist in the sales. The clerk was directed to execute and deliver certificates of sale to the purchaser, and on presentation of these certificates, the auditor was required to convey the lands to them. Such are the substantial provisions of the statute of 1845. The language of this law is broad enough to vest the title *ipso facto* in the State. It is free from all ambiguity whatever—declares the title of the owner forfeited, and transfers it to the State. If constitutional, which, as we have seen, is at least a debatable point, the purchaser at a sale of these forfeited lands, will acquire a valid title, where the law has been strictly complied with by the officers making the sale. The only requirements are, a list transmitted by the auditor to the clerk, an advertisement by the clerk, and a sale by the clerk and sheriff.² It may be a question, however, whether the owner may not redeem at any time before a legal sale of his land takes place. The prior statutes of Illinois were similar to the Ohio acts referred to; if the land was not sold at the ordinary tax sale, they were directed to be stricken off to the State, and afterwards sold to the highest bidder. It is presumed, that in all cases where lands have been forfeited or struck off to the State, they cease to be taxable; and if again listed and sold by the officers, the purchaser will acquire no title.¹ And under the Ohio and Illinois statutes, the county auditor in the former, and the county clerk in the latter State, cannot advertise

¹ *Buckley v. Osborn*, 8 Ohio R. 180.

² Of course, the proceedings *prior to the forfeiture* must have been regular in all respects.

and sell until they are furnished with a transcript of the forfeited lands by the State auditor.¹

The Ohio statute of February 1, 1825, declared that forfeited lands should vest in the State, with a proviso that the former owner might reinvest himself with the title by paying all taxes, penalties and interest due upon the land, at any time prior to the disposition of the land by the State. The act of March 14, 1831, made provision for the sale of the land, and declared "that if any lands shall be sold by virtue of the provisions of this act, the property of a feme covert, minor, or insane person, or person in captivity, the owner or owners thereof shall have the right to redeem the same," etc. In *Reynolds v. Leiper's heirs*,² which was an application to redeem from a sale made of forfeited lands under the foregoing statutes, it appeared that the land in question belonged to Thomas Leiper, and was forfeited in 1826. Leiper died in May, 1831, leaving the applicants his heirs, all of whom were minors; the land was sold December 12, 1831, for the taxes due thereon for the years 1826, 1827, 1828, 1829, 1830 and 1831. The redemption was resisted upon the ground, that as the forfeiture happened during the life-time of the ancestor, no such estate descended to the heirs, as would authorize them to redeem. The Common Pleas ordered a redemption, and the order was affirmed by the Supreme Court. In *Hodgdon v. Wright*,³ where land was forfeited to the State for the non-payment of taxes due upon it, and afterwards sold and conveyed to the purchaser, and between the day of forfeiture and the day of the sale, the owner paid several assessments of State

¹ *Hannel v. Smith*, 15 Ohio R. 134.

² 6 & 7 Ohio R. 250.

³ 36 Maine R. 326.

taxes due upon the land, which were received by the State without objection, and appropriated ; this was held to be no waiver of the forfeiture. By the court : " It is insisted that the State could not assess the land as owned by others, and receive payment from them for such taxes, and yet claim to be itself the owner of those lands by forfeiture. There would have been an inconsistency in such proceedings, if there had been no intention to permit the owners to redeem. The State, however, does not appear to have insisted upon forfeitures when it could obtain payment without. Such a course of proceedings might, perhaps, be properly regarded as a pledge, that the owners would be permitted to redeem. By the act approved August 10, 1848, the owners of the lands forfeited, were not only permitted to redeem them from the State, until they were finally sold at auction by the land agent, but provision was made that they might redeem from the purchaser at any time within one year after the sale. Under such circumstances, by continuing to assess them, and to receive payment of taxes, the State cannot be considered to have waived any claim to a forfeiture, further than it has manifested an intention to do so by its enactments."

There was a statute in Ohio which made it the duty of tenants for life to list the estate and pay all taxes assessed upon it, and declared that a neglect to do so "shall *forfeit* to the person or persons in remainder or reversion, *all the estate* which he or she so neglecting or refusing, may have in said lands," etc. In the *Lessee of McMillan v. Robbins*,¹ which was an action of ejectment by the reversioner, to enforce a forfeiture under this statute, it appeared upon the trial, that

¹ 5 Hammond R. 28.

William McMillan, the owner, made a will devising the lands to his wife for life, with remainder to the lessors of the plaintiff, and died. The wife on February 29, 1825, made a lease to the defendant of the premises thus devised to her, and which were the same in controversy, for and during the term of her natural life, upon certain trusts for herself and minor children, and thereupon the defendant entered into possession. Neither the tenant for life, or her lessee, ever caused the land to be listed for taxation in the name of the one or the other, but it stood listed in the name of the "heirs of William McMillan." The taxes for 1827 and 1828, were not paid, and the land was sold for these taxes in December, 1828, to William Corry, one of the lessors of the plaintiff. On April 28, 1829, the defendant deposited with the county auditor money to redeem from the tax sale. Judgment was rendered for the plaintiff, the court holding, 1. That the law was constitutional. 2. That it applied as well to tenants for life who held the estate in trust, as to ordinary tenants. 3. That a forfeiture had been incurred. 4. That the defendant could not redeem, because his interest was divested by the forfeiture, and a redemption could not restore him to his former rights; and, 5. That the remainder man could enforce the forfeiture by ejectment.

CHAPTER XXXIII.

OF THE EFFECT OF THE REPEAL OF THE LAW UNDER WHICH
THE PROCEEDINGS TOOK PLACE.

It is a well established principle of law, that when a statute is repealed, it must be considered as to all transactions *in fieri, closed*—as never having had an existence at all.¹ This rule is subject to two exceptions: 1. Where existing rights and remedies are expressly saved by the repealing clause; and, 2. Where rights have become perfected and vested under the old law, the repealed statute is regarded as in full force, notwithstanding its repeal. In the former case, the old law is regarded as in full force, because the legislature have so declared, and its authority is amply sufficient to accomplish that intention; and in the latter instance, where a right has become vested, it is not within the scope of legislative power to divest it by a repeal of the statute under which it was acquired.² The general rule is illustrated by the case of *McQuilken v. Doe*,³ where the land in question was sold November 4, 1824, for the State, county and road tax. The road tax was assessed under the law of 1822, which was repealed September 1, 1824, after

¹ Dwaris, 676; Smith's Com. 890.² Smith's Com., Chap. 19.³ 8 Blackf. R. 581.

the assessment of the tax, but before the sale took place. The repealing law contained this clause: "saving, however, any act done, etc., previous to the passage of this act, etc." The court held the sale void, saying: "The road law being thus repealed, the case is without difficulty. The law is well settled, that when a statute is repealed, it must be considered, except as to transactions passed and closed, as if it had never existed. The case before us is one where a statute requiring a certain tax to be collected, and prescribing the mode of its collection, was absolutely repealed, at least two months before the sale in question to enforce the payment of the tax was made; and we hold that such sale, and all the proceedings for the collection of the tax, after such repeal, were void." The Illinois statute of February 26, 1839, which prescribed a new mode of proceeding to enforce the collection of taxes,¹ contained this clause: "All acts and parts of acts, coming within the *purview* and meaning of this act, and all laws or parts of laws heretofore passed, exempting town lots and other property in incorporated towns from taxation, for State and county purposes, together with all laws heretofore enacted, requiring merchants to obtain a license to sell goods, are hereby repealed: *Provided, that the repeal of said acts shall in no way affect or impair any right or interest acquired under said acts.*" An ejectment cause came before the Circuit Court of the United States for the District of Illinois, several years since, where the defendant relied upon the statute of limitations, basing his adverse possession under the act "to quiet possessions, and confirm titles to land," approved March 2, 1839,² which required "*claim and*

¹ *Ante*, pp. 224—234.

² Session Laws 1839, p. 266.

color of title made in good faith," upon a deed made in pursuance of a sale for taxes, held after the repealing statute above recited took effect, and which sale was conducted in pursuance of the repealed law. The cause was fully argued, and Judge Drummond held, upon general principles, and the authority of the Indiana case, that the sale was void; that the saving clause in the act had reference only to vested rights acquired by purchasers, under sales made prior to the passage of the repealing statute, and not to the right of the State to collect the tax under proceedings *in fieri*; that it was a saving of private rights, and not of those belonging to the public; that the tax deed was void upon its face, when tested by the law; and that the defendant had no color and claim of title within the meaning of the statute of limitations. The same principle was maintained by Judge Minshall, (now deceased,) upon the circuit. The question never came before the Supreme Court of the State, and it is presumed that the decisions in both cases were satisfactory to the bar. Certain it is, they were correct upon general principles. All *inchoate* rights derived under a statute, are lost by its repeal, unless expressly saved. It is otherwise, however, in regard to such civil rights as have become so far perfected as to stand independent of the statute; or, in other words, such as have ceased to be executory, and have become executed and vested.¹ The rule, that vested rights acquired under a law are not affected by a repeal, is founded in good sense and reason, and is consonant to the fundamental principles of natural justice. It was derived from the civil law. Puffendorf remarks that "the law itself may be disannulled by the author,

¹ *Butler v. Palmer*, 1 Hill R. 324.

but the rights acquired under it must still remain." This principle of natural justice has become one of the axioms of constitutional law in this country. No vested right to property, acquired by virtue of a statute, can be divested by a repeal or modification of the law.¹

This principle was fully discussed by the counsel, and considered by the court, in *Bruce v. Schuyler*,² where the defendant in error claimed title to the land in question, under a tax sale, made January 12, 1833, in pursuance of the acts of 1827 and 1829. He paid the purchase money, and received a certificate of sale at the time of his purchase, but the deed was not executed until November 8, 1833. Between the day of the sale and the time when the deed was executed, the laws of 1827 and 1829, as the counsel for the plaintiff in error contended, were repealed, (February 27, 1827,) thereby depriving the auditor of the power to execute and deliver a deed to the purchaser at a sale made prior to the date of the repealing act. In delivering the opinion, Chief Justice Wilson said: "But there is a constitutional ground upon which this question may be placed, that, I think, is conclusive. I admit that a court ought not to declare a law unconstitutional, unless the opposition between it and the constitution is direct and clear; but when such is the case, the duty of the court is imperative, and if it should shrink from its performance, it would betray the trust confided to it. Was it within the constitutional competence of the legislature to abolish the power of the auditor to

¹ *Fletcher v. Peck*, 6 Cranch R. 87; *Benson v. Mayor of New York*, 10 Barbour S. C. R. 233; *Plymouth v. Jackson*, 15 Pa. State R. 44; *Butler v. Chariton County Court*, 13 Missouri R. 112; *Wright v. Marsh*, 2 G. Green R. 94.

² 4 Gilm. R. 221.

make a deed after the passage of the act of 1833, to land sold prior to that time, under the act of 1827, and thereby deprive a purchaser of a deed from that officer, or any other authority competent to make a valid one? The constitution of the United States provides, that no State shall pass any law impairing the obligation of a contract, etc. The State constitution contains the same prohibition upon the power of the legislature, with the difference of the word 'validity' in the place of that of 'obligation,' used in the constitution of the United States. Is the sale made by the auditor of the land in question a contract within the meaning of the constitution? That, I think, will be manifest by adverting to the law authorizing the sale, and the action under it. In order to collect its revenue, the State authorizes the auditor to sell the land of delinquent tax payers; that officer accordingly gives notice that he will sell all such lands at a time and place specified; and as an inducement to purchasers, the law provides that the auditor shall give to the purchaser a certificate of purchase, or a deed, at the option of the purchaser, to the whole or such part of each tract of land as he may purchase and pay the tax due thereon. Upon these terms the land is sold, the stipulated price paid by the purchaser, and a deed therefor executed by the auditor; but before the deed is made, the law authorizing this officer to sell and convey delinquent lands is said to be repealed, and the duty of making these sales is imposed upon other officers. The case thus stated embraces all the constituent parts of a contract, so fully and clearly as to leave no doubt as to the character of the transaction. All argument, therefore, to prove it a contract would be superfluous, and

that it is such an one as is contemplated by the constitution, can, I think, be made equally clear, and if so, it follows, that the legislature could not constitutionally destroy the authority of that officer to convey the land according to the terms of sale, by a repeal of the law requiring the performance of that duty. Such an act would impair the obligation of the contract, and would consequently be void. By a series of adjudications, the conditional provision referred to has been so construed as to protect the validity of contracts from all legislative encroachment, in any and every form in which it may be assailed. Any act, therefore, which changes the expressed intention of the parties to a contract, or which results from their stipulations, is held to impair its validity, and it is immaterial as to the extent or the manner of the change, whether it be ever so minute, or relates to its construction, its evidence, or the time or manner of its performance, the conclusion is the same. Every conceivable change of a contract impairs its validity, and renders it null and void. This constitutional provision extends to and embraces both contracts executed and executory, and as well those entered into by a State, as those made by individuals. And in a leading case upon this subject, it has been held by the Supreme Court of the United States, that a legislative grant is a contract within the meaning of the constitution, and that a subsequent act of the legislature repealing it, was null and void for that reason. It is insisted, however, by the counsel for the defendant, that the subsequent act of the legislature, which repealed the fourth section of the act, which requires a conveyance to be made to the purchaser, is not in conflict with the constitution, because it

operates only upon the remedy of the purchaser, and not upon the obligation of the contract, and numerous authorities are referred to for the purpose of sustaining this position, but they totally fail to do so. The execution of a deed to the purchaser, by the auditor, at the time and in the form prescribed by the law, is as much a part of the contract as any other portion of it. It is one of the stipulations contained in the law, as an inducement to the purchase of the land, and from its importance as confirming and evidencing title, it cannot be doubted, was in the contemplation of the purchaser, at the time he made the contract. It, therefore, enters into and forms a part of the binding obligation of the contract, as much as the agreement of the purchaser to pay the price of the land at which it was bid off by him. It is not controverted that the legislature may change the nature and extent of the remedy, by which a contract and the rights of the parties may be enforced. But the cases referred to by the counsel for the defendant, to justify the repeal insisted upon, are such as affect vested rights, which are not secured by any constitutional provision, by reason of their not vesting under a contract, or such as take away a peculiar privilege, conferred by a prior act, or the repeal of a penal or criminal law, by which the jurisdiction of the court is divested, before any right under it has ripened into a contract or vested interest. The authority to either repeal or modify, according to their nature, these pre-existing laws, is admitted. There is also another class included in the reference, recording and limitation laws, in relation to which a great stretch of legislative power is allowed, yet, even with regard to them, it is not without its limit.

The obligation of a contract is that which obliges a party to perform his contract, or repair the injury done by a failure to perform; and as regards the remedy, it may be modified by the legislature, but not entirely abolished, for, in substituting one mode of proceeding for another, they must afford a reasonable remedy. An act that should wholly extinguish all existing remedy, so as to leave no redress, and no means of enforcing a contract, would, by operating *in presenti*, impair its obligation. If, therefore, the act of 1833 be regarded as abolishing the power of the auditor to make the deed in question, it is equally obnoxious to the constitutional prohibition, whether it is considered as operating upon the obligation, or the remedy upon the contract, because it extinguishes all redress, by taking from the purchaser all remedy against the only one who had authority to make the conveyance, without substituting any one in his place for that purpose, which might have been done; for it is not contended that there is, or can be, a vested right in a particular remedy, or in a special mode of administering it. In these, then, there is no vested right, but there is such a right in some substantial and efficient remedy, and that right is as much within the protection of the constitution, as the obligation of the contract. The act, therefore, that takes away the old remedy, as is contended has been done in this case, without providing a new one, is repugnant to the constitution and void. It has been suggested by counsel, that the legislature would make a deed upon a proper application; but that is not an adequate remedy, the grant of which depends upon the will of the legislature. 'When,' says Judge Story, 'we speak of the obligation of a contract, we include, in the

idea, some known means, acknowledged by the municipal law, to enforce it.' It is also a well settled principle, that the repeal of a law in which a contract consists, is an infringement of the constitution. A legislative grant is a contract of this description, and so is the one under consideration, so far as relates to the conveyance. A repeal, therefore, of that part of the law which provides for a conveyance, would impair, to that extent, the obligation of the contract. Whatever diversity of opinion, therefore, there may be, as to how far the existing law enters into, and forms a part of, a contract between individuals, as a general rule, I think there can be no question that it does so in this case, and that the purchaser's title to a deed cannot be taken from him by the repeal of a law that forms part of the contract. If it was otherwise, then every executory contract entered into by the State, or its officers on her behalf, in virtue of an act of the legislature, may be avoided by them at discretion, although the terms of the contract have been complied with by the other contracting party."

It is well settled, that repeals by implication are never favored, and that the repugnancy between a prior and subsequent statute, must be of such a character that the two cannot be reconciled with each other, and made to stand together. In this connection it may be added, that no revenue law is to have a *retrospective* operation, unless the language of the law is so clear and explicit as to leave no room for doubt, and even then, if such retroaction has the effect to divest rights acquired under the prior law, such a construction cannot be tolerated.¹

¹ *Garrett v. Wiggins*, 1 Scam. R. 335.

And it may be laid down as a general rule, that in determining the validity of a tax title, the case must be governed by the law as it stood at the time of the assessment and sale.¹

¹ *Brown v. Veazie*, 25 Maine R. 359; *Eldridge v. Tibbitts*, 5 Lou. An. R. 380.

CHAPTER XXXIV.

OF THE JURISDICTION OF THE COURTS IN CAUSES INVOLVING THE VALIDITY OF TAX SALES, AND OF THE REMEDIES OF PARTIES INTERESTED THEREIN.

ORDINARILY, the validity of a tax, and the regularity of the proceedings to enforce its collection, are questions properly cognizable in a court of law. But a court of equity undoubtedly possesses ample authority to restrain a tax sale, where injustice might result, but for this restraining power. It is well established, that equity will restrain the sale of an estate, in all cases of trusts, and *special authorities*, where the sale would be inequitable, or operate as a fraud upon the rights or interests of third persons; and especially where the trustee is about to abuse his trust, or the donee his authority.¹ This principle is applicable to tax sales. Where the officer has no power to sell, or proceeds to sell without observing the more essential requirements of the statute, under which he derives his authority, a court of equity may enjoin the sale. *The officer has no right to proceed in such a case, or in such a manner*; and the execution of the power under such circumstances, is calculated to cast a cloud upon the title of the owner, and to render it *unmarketable*, in

¹ 2 Waterman's Eden on Injunctions, 339, note.

the equitable sense of that term. And the effect may be, that a legal contest about the right may be postponed until the evidence of the owner's right may become lost by time or accident. Where the owner is in possession of the land, at the time the illegal proceeding is about to take place, he has no remedy in a court of law, which would indemnify him for the threatened wrong to his title. Should a sale and conveyance take place, under the proceedings alleged to be illegal, the owner, *because of his possession*, could not test their legality by an action of ejectment; and, unless the purchaser at the tax sale, or those claiming under him, disturb the possession, or commit some act of trespass, to the injury of the inheritance, thereby inviting the rightful proprietor to a contest, the latter would be entirely remediless at law, and compelled to await the action of the adverse claimant. Surely, under such circumstances, a court of equity would grant relief upon the familiar principles of action in that court. The New York authorities seem to be somewhat vacillating upon this point. In one case, it is said, that if the proceedings are void, the law affords an adequate remedy, without a resort to a bill in equity; in such case, the sale would not divest the title: on the other hand, where the proceedings are merely *erroneous*, and not *void*, there is no equitable power in the court to revise and correct them.¹ But in *Van Doren v. New York*,² an illegal tax proceeding was enjoined, the court taking the distinction between a proceeding void upon *its face*, and one rendered so by *extrinsic* evidence; *e. g.*, where the land was not subject to taxation, where the taxes had been paid, or the sale redeemed from.

¹ *Livingston v. Hollenbeck*, 4 Barb. S. C. R. 16; *Van Ransselaar v. Kidd*, Ibid. 17.

² 9 Paige C. R. 388.

In other cases, the courts of that State have sustained bills of interpleader against collectors of adjoining counties, at the suit of the tax payer, where his property has been assessed in each county.¹ The reason of the distinction in the New York cases, between proceedings void upon their face, and those which are rendered void by evidence *abunde*, is, that in the former case, the defect will remain apparent as long as the document has an existence; while in the latter case, the evidence of illegality rests in the memory of man. With due deference to the New York judges, who are conceded to be highly respectable, in point of legal attainment, it may be remarked that their adjudications cannot be supported upon principle, and are clearly against the current of authorities. Preventive justice, administered through the restraining power of a court of equity, is one of the most valuable features in our system of jurisprudence. The application of this principle, to proceedings to enforce the collection of a tax, and to tax sales, is not difficult. Where there are no equitable circumstances to distinguish the case from an ordinary trespass, except the single fact, that the act sought to be enjoined, is about to be committed by a public officer, under color of law, and where the remedy at law could afford a complete and ample satisfaction, for the threatened injury, a court of equity would not be authorized to exercise this restraining power. There must be some circumstance attending the trespass, which distinguishes it from a common trespass, and which appeals to the conscience of the chancellor for the relief prayed. Thus, in the case

¹ *Van Ransselaar v. Kidd*, 4 Barb. S. C. R. 17; *Thompson v. Ebbetts*, Hopkins C. R. 272; *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige C. R. 384.

of *Osborne v. Bank U. S.*,¹ the Supreme Court of the United States held that it was proper to enjoin the collection of a tax, upon a branch of the United States Bank, levied under the authority of the laws of the State of Ohio, upon the ground that the taxing power of the State, if once conceded, without limitation as to its extent, tended to the *destruction* of the franchise of the bank, which was a fiscal agent of the government, and also would have the effect of disordering the national finances. On the other hand, when a tax — simply unconstitutional — unaccompanied by any circumstances of peculiar injury, is about to be enforced by a distress and sale of personal property, in the ordinary way, and for which wrong the complainant had an adequate remedy at law, cannot be enjoined by a court of equity.² These cases fully illustrate the extent of the doctrine contended for. Courts of equity are invariably in the habit of granting injunctions to stay waste, spoil and destruction, and other injuries to the inheritance, attended by circumstances of peculiar hardship; or where, according to the analogies of equity jurisprudence, relief to the injured party would be proper. They have also interfered to prevent sales of land, under a claim of authority or right — such as cases to stay sales, under a power in a mortgage, deed of trust, marriage settlement — under leasing powers, and powers of revocation and appointment, indeed, under all classes of powers arising *ex contractu* — in such cases, it has never been inquired whether the title to be made, under such a power, will or will not be indisputable. The fact that the proceeding takes place under a statute authority, cannot affect the application of the general rule. It

¹ 9 Wheaton R. 773; 5 Cond. R. 771.

² *McCoy v. Chillicothe*, 3 Ohio R. 370.

sounds ill, in the mouth of him who attempts to sell another's land, under color of law, to say that his sale will be a nullity, and therefore cannot injure the complainant. The *right to sell*, is the subject of inquiry. The reason is much stronger for restraining an illegal tax sale, than any other class of illegal sales. Prior to the sale, no one has a vested interest in the proceeding, save the government, to the extent of the tax; and where power to levy the tax exists, but the proceeding to collect it is illegal, the exercise of a speedy restraining power, furnishes the State with notice of the illegality, and enables the government to reassess the tax, and enforce its collection in a legal manner. If, on the contrary, the tax itself is illegal, the State has no right to harrass her citizens, by proceedings to enforce its collection. As before hinted, so long as the owner remains in possession of his estate, the common law gives him no remedy against the person who claims the title to, or attempts to exercise a power over, his property. The claim of title or power may hang over him all his lifetime, *clouding* his title, and preventing a sale, or other enjoyment of his estate, if the person claiming adversely chooses to lie by, and not bring his ejectment. This may be ruinous to the true owner, and therefore a court of equity will invariably interfere in his behalf. Besides, no chancellor would hesitate to exercise this power, where the law declares the tax deed to be *conclusive*, or even *prima facie* evidence of title in the purchaser. The best reasoned case in support of this doctrine is *Burnett v. Cincinnati*,¹ which was a bill in chancery for an injunction, to enjoin a sale by the marshal of the city, of real estate owned

¹ 3 Ham. R. 73; S. C., 14 Ohio Cond. R. 476.

and *possessed* by the complainant, for a city assessment to improve the streets. The bill set out the title and *possession* of the complainant, and the nature and character of the assessment made by the city council, alleging that it had not been made in accordance with the charter and ordinances, but was illegal and void; stating particularly wherein the illegality of the proceeding consisted. The prayer of the bill was to stay the sale until the matter should be heard and adjudged of in equity. The defendants demurred, and the bill was dismissed *pro forma*. The defendant appealed to the supreme court, where the demurrer was overruled, and a perpetual injunction awarded. By the court: "The bill, in this case, represents, that under a proceeding altogether illegal and void, but, nevertheless, under legal color, the defendants are about to sell a part of the real estate of the complainant, and prays the interference of the court, in the exercise of its chancery powers, to restrain them by injunction. The demurrer, and the argument in support of it, admit the truth of the allegations, and deny that this court can aid the party. If this be a tenable position, it results that public officers, having authority to operate upon the property of their fellow citizens, must be permitted to proceed, however illegal, unjust, or oppressive their conduct may be. It follows, too, that the property of a citizen may be exposed to sale, under circumstances that render it impossible for the parties to know whether a title can pass or not. Thus involving great hazard to all concerned, and perplexing the titles to real estate, for no beneficial purpose to any person whatever. If such be the rule of the law, we must so administer it. But nothing short of a series of

repeated adjudications would be sufficient to demonstrate that the law is so settled. The authorities which have been referred to, do not lead to the conclusion insisted upon by the defendants. They all proceed upon the principle, that in very many cases, this court may interpose to prevent mischief, and to protect individuals in the enjoyment of their rights. Where aid has been decreed, it has always arisen from the circumstances of the particular case. And the confusion and seeming contradictions in the cases, are occasioned by the dicta of the judges, and not by any confliction in the principle decided. In regard to real estate, it is well established that chancery may interpose, by injunction, to prevent what is considered as destruction. But destruction, in the sense used, does not mean annihilation. It means no more than that injury which greatly impairs its intrinsic value. In a city, the sale of part of a lot for assessments, may often be very destructive to the interests of the proprietor, though no title passes by such sale. A cloud would be cast upon the title, which litigation only could remove, and until removed, the property might be valueless to the owner; subject, too, during the period of litigation, to additional assessments and embarrassments. When an assessment of a tax is made, and its legality disputed, the uncertainty attendant upon the final result, puts the estate upon which it operates, in imminent jeopardy. If no title passes by a sale, the party has remedy at law. He can defend his possession; but if title does pass, he is remediless altogether. A mode, therefore, of deciding the question, before any right is effected, is safest for all parties. It was upon this ground the court entertained jurisdiction

in the case of *The Bank United States v. Shultz*, from which, in principle, this case is not distinguishable. The defendants concede, that if a sale were made, this bill might be sustained under our statute. To sustain it now, is clearly within its letter. A claim is set up, not to enter in and enjoy under title, but to create a title under which another may so enter. Setting up a claim to dispose of the title, is "*setting up a claim thereto*," which are the terms employed in the statute. The case is clearly within the mischief intended to be remedied, as it is within the words of the law. The power to interpose might be safely grounded upon the statute alone. But we think it stands upon the general principles that govern the court, with respect to injuries to which no other adequate remedy can be extended. Consequences that might ensue in respect to the collection of revenue, furnish no reason why the court should not interpose. The application for an injunction is addressed to the sound discretion of the judge who allows it, and there is no reason to apprehend that it will be allowed upon trivial grounds. The case of the *Bank United States v. Osborn and others*,¹ is a case directly in point of enjoining the collection of a tax. That case was most earnestly litigated, and yet the counsel who resisted the injunction, did not attempt to maintain that the jurisdiction could not be sustained, on the ground that it interfered with the collection of the revenue. We overrule the demurrer, and send back the cause, at the suggestion of the defendants, for further proceedings." The statute of Ohio alluded to in the foregoing opinion, provided that "any person having both the legal title to, and

¹ 9 Whea. R. 738.

possession of land, may institute a suit against any other person *setting up a claim* thereto." As intimated in *Burnett v. Cincinnati*, it is the established doctrine of the Ohio courts, that this statute is merely declaratory of that jurisdiction of courts of chancery which existed prior to its enactment. It is now well settled, that a court of chancery possesses jurisdiction to enjoin sales of land by sheriffs and tax collectors, when necessary to protect the parties in interest.¹ The collector is a proper and necessary party to such a bill.²

It is also held, that the former owner may be relieved in a court of equity, against an illegal tax sale, and conveyance based thereon, by a decree setting aside the sale, canceling the tax deed, and perpetually enjoining the purchaser and those claiming under him, from asserting title, making an entry upon the land, or otherwise disturbing the title or possession of the complainant. The case of *Yancey et al. v. Hopkins*,³ was a bill in chancery, filed by Yancey, to set aside the sale and conveyance of a parcel of land, sold on the 19th day of September, 1786, for the taxes of 1784-5, and purchased by Yancey, the deputy sheriff who made the sale, and was one of the defendants, and by him conveyed to Harris, the other defendant. The chancellor in the court below set aside the sale, and decreed the cancellation of the tax deed, whereupon the defendants appealed. The complainant, an infant, was the owner of the estate at the time of the sale, and resided in a foreign county. Harris was in possession of the land at the

¹ *Anderson v. State of Mississippi*, 23 Miss. R. 459; *Lyon v. Hunt*, 11 Alabama R. 295; *Dyer v. Branch Bank of Mobile*, 14 Ibid. 622.

² *Anderson v. State of Mississippi*, 23 Miss. R. 459.

³ 1 Munf. R. 419-437.

time of the sale, under the dower claim of Elizabeth Hopkins, the mother of the complainant, and had upon the premises personal property of value sufficient to satisfy the tax. The land was listed in the name of Elizabeth Hopkins, and sold and conveyed as her property. The sale was held void upon two grounds. 1. Because it ought to have been listed and assessed in the name of the complainant, under a statute requiring the commissioners "to take an account in writing, of the quantity of land belonging to all persons within their counties, and also the name of the proprietor or proprietors thereof, and ascertain the value thereof;" and, 2. Because the officer sold the land when there was a sufficient distress upon the premises to satisfy the tax, the law having made personalty upon the premises the primary fund for the payment of the tax. Upon the question as to the jurisdiction of a court of equity to grant relief in such a case, Judge Tucker, in delivering the opinion said: "It was objected by the appellant's counsel, that the complainant had a plain remedy at law, by ejectment to recover the premises. But I am of opinion that he had a right to come into a court of equity, for the purpose of setting aside a deed which might have obstructed his recovery in ejectment. And it was more beneficial to the defendants that he should do so, as they might, by their answers, purge themselves of any imputations of fraud or collusion in making the sale. Besides, the object of the bill was to compel a reconveyance of the land from the defendant Harris, which a court of law could not enforce. And, as a simple verdict in ejectment might not have been conclusive, I think the parties pursued the most proper course." In *Dudley et al. v.*

Little et al.,¹ a tax sale and deed were set aside because of a fraud among the bidders at the sale. In *Roland v. Doty*,² the sale and deed were set aside because the taxes had been paid previous to the sale. And in *Bacon v. Conn*,³ a tax deed was ordered to be canceled where the owner had tendered the money to redeem, and the purchaser had refused to receive it. It will thus be seen, that where the proceedings have been irregular, the taxes paid, or a redemption effected, or tendered, equity will grant relief. When a tax sale comes before a court of equity, it is regarded with but little favor, the inadequacy of consideration being so gross, that a title thus derived is sustained in such a *forum*, only when the law has been rigidly complied with in its every requisition. In the language of Judge Pope, a tax title is one of strict right, where a court would not grant a new trial, or a chancellor enforce such an unequal bargain.⁴ And in *Douglass v. Dangerfield*,⁵ where the tax purchaser was complainant, Judge Hitchcock, in delivering the opinion said: "This is a case of considerable importance, whether we consider the amount of property in contest, or the principles involved. The amount of property exceeds 1300 acres, which the complainant claims he is entitled to, for which he has paid, or rather, originally paid \$17,534. Having paid this much for the land, he now attempts, in a court of chancery, to force the legal title from the defendants. If there had been between these parties a contract of purchase and sale of this land for the same amount of purchase money, had this purchase money been

¹ 2 Ham. R. 504; 1-4 Ohio Cond. R. 445.

² 1 Harrington Ch. R. 3.

³ 1 S. & M. Ch. R. 348.

⁴ *Mayhew v. Davis*, 4 McLean R. 213.

⁵ 10 Ohio R. 152.

paid, and had an application been made in chancery, on the part of the vendee, to enforce such contract, no court, acting upon the well known principles of equity, would hesitate a moment in dismissing the bill on the ground of *inadequacy of consideration*. And, upon similar principles, a court of equity would not interfere to relieve a purchaser at a tax sale, as between him and the owner of the land, *except when required to do it in consequence of positive law*."

It may therefore be laid down, as a general rule, that a court of equity will give a thorough and close scrutiny into a title derived under a tax sale, whenever it comes before that court.¹ The facts of the latter case are given in a subsequent chapter.² It is proper to add, however, that upon the principle that whoever seeks equity, must do equity, a court of chancery will impose terms upon the complainant in granting him relief. Thus, in *Dudley et al. v. Little et al.*,³ where a sale was set aside for fraud, the court granted the decree, upon the condition that the complainants would refund to the defendants the purchase-money, paid at the tax sale, with the fifty per cent. penalty allowed by law, and on the payment of all of the costs in the cause. It is also held, that creditors who have a lien upon land which has been sold for taxes, or who have a right in equity to resort to the land, for the payment of their debts, may file a bill to set aside an illegal tax sale, and thus dispel any cloud upon the title of their debtor, and remove any obstacle thus created to the enforcement of their lien or right.⁴

¹ *Douglass v. Dangerfield*, 10 Ohio R. 152; *Yancey v. Hopkins*, 1 Munf. R. 419; *Blakeney v. Ferguson*, 3 Eng. Ark. R. 277.

² Chapter 35.

³ 2 Hammond R. 504.

⁴ *Gillett v. Webster*, 15 Ohio R. 623; *O'Brien v. Coulter*, 2 Blackf. R. 421; *Branson v. Yancey et al.*, 1 Dev. Eq. R. 77.

But in the Ohio case, where the law declared, that whenever a tax sale should be held invalid, the owner, or other party in interest, should refund the taxes to the purchaser at the sale, and made the tax a lien upon the land in favor of the purchaser, the bill of the creditor was dismissed because he failed to prove a tender of the money, due under this statute, to the purchaser. It may be added, that a redemption may be enforced by *mandamus*, where the relator has a legal right to redeem and has complied with the requisitions of the statute. Thus much for the remedies of the owner and his creditors.

Where the purchaser has acquired a right at a tax sale, he may enforce it by such remedies as are usually adopted in analogous cases. Thus, if the officer refuses to execute and deliver to him a certificate of purchase, or deed of conveyance, when he has become entitled to either by a fair and regular purchase, he may by *mandamus* compel the execution of them,¹ and in some instances, a bill in chancery may be regarded as appropriate.² The question has been discussed, and variously decided, in Ohio, as to the right of the purchaser of an equity at a tax sale, to come into a court of chancery, and treating the holder of the legal title as a trustee, compel a conveyance of the latter title. The question will be examined in a subsequent part of this work.³ One thing is evident, however, that the purchaser who seeks relief under such circumstances must aver in his bill, and prove

¹ *Maxcy v. Clabaugh*, 1 Gilm. R. 26; *People v. Mayor, etc.*, 10 Wend. R. 395; *Ante*, 351, 440.

² *Ante*, 440-1; *Bank of Utica v. Mersereau*, 3 Barb. C. R. 528.

³ *Rennick et al. v. Wallace*, 8 Ohio R. 540; *Stuart v. Parish*, 6 & 7 Ibid. 204; *Wallace v. Seymour*, Ibid. 313; *Douglass v. Dangerfield*, 10 Ibid. 152; *Gwynne v. Neiwanger*, 15 Ibid. 367; S. C., 18 Ibid. 400; S. C., 20 Ibid. 556.

upon the hearing, a strict compliance by the officers with all of the requirements of the law under which the proceeding took place.¹ Under the land system of several of the States of the Union, the holder of a land warrant, after a location and survey, but before the record of the proceedings, has a right to withdraw his entry and make a new location upon any vacant and unappropriated land.² But it is held in Ohio, that after the entry has been recorded, and the right of the locator has thus become fixed, it is not in his power to withdraw the entry, so as to destroy the tax lien of the State, or avoid the title of the purchaser at the tax sale.³ The purchaser at a tax sale cannot recover the possession from the former owner, or any person claiming under him, in an action of forcible detainer. Ejectment is his only remedy.⁴ But there is a statute in Ohio which gives this remedy to the purchaser.⁵ It is a general rule, subject to occasional exceptions, that the remedial power of a court of equity does not extend to the supplying of any circumstance, for the want of which the legislature has expressly, or by implication, declared the instrument or act void; for otherwise, equity would, in effect, defeat the very policy of the legislative enactments. In this respect there is a clear and manifest distinction between *public* and *private* powers when defectively executed. A power created by private parties, when defectively executed by reason of fraud, accident or mistake,

¹ *Douglass v. Dangerfield*, 10 Ohio R. 152.

² *Galt v. Galloway*, 4 Peters R. 339; *Hollingsworth v. Barbour*, Ibid. 494; *McArthur v. Nevil*, 3 Ohio R. 178; *Taylor v. Meyers*, 7 Whea. R. 23; *Wallace v. Porter*, 14 Ohio R. 277; *Jackson v. Clark*, 1 Pet. R. 629.

³ *Hemphill v. Holt*, 3 Ham. R. 232; *Douglass v. Dangerfield*, 10 Ohio R. 152; *Wallace v. Seymour*, 6 & 7 Ibid. 313.

⁴ *Kelly v. Hunter*, 12 Ohio R. 216.

⁵ *Hannel v. Smith*, 15 Ohio R. 134.

may be aided by a court of equity. But where the power is created by statute, it is construed with more strictness; and whatever the formalities required by the statute to attend the execution of the power, they must be punctiliously complied with, and no defect can be aided in equity. Courts of equity cannot dispense with the regulations prescribed by a statute, at least where they constitute the apparent object and policy of the law.

It may be laid down as a general rule, subject to no exceptions, that in regard to powers, which are in their own nature *statutable*, equity must follow the law, however meritorious the consideration. Thus, the power of a tenant in tail to make leases under the English statute, if not executed in conformity with the requisitions of the statute, will not be made available in equity under any circumstances. Fines and common recoveries are judicial powers, based upon statutes, and the rule is, that equity will not aid a defective fine against the issue, nor a defective recovery against the remainder man. The power to make a will is also a statutory authority, and if the solemnities required by the statute to attend the execution of the will have been omitted, through ignorance or mistake, the devisee cannot enforce his imperfect title under the power, against the heir. Whenever, in any case, a statute prescribes the mode and manner of acquiring title under a power created by the legislature, the power must be executed in that way, and whenever there is a failure to conform to the statute requisitions, the title is void at law.¹ And when void at law, equity cannot aid any defect in the execution of it.² These two cases are the

¹ *Young v. Keogh*, 11 Illinois R. 642. ² *Young v. Dowling*, 15 Illinois R. 481.

strongest illustrations of the rule which can be found in the books. The statute of Illinois in relation to guardian sales made under orders of the Circuit Court, for the maintenance and education of the ward, provided that "it shall be the duty of the guardian making such sale, as soon as may be, to make return of such proceedings to the court granting such order, which, if approved by the court, shall be recorded, and shall vest in the purchaser or purchasers all the interest the ward had in the estate so sold." This requirement was omitted in *Young v. Keogh*, which was an action of ejectment, and the sale was held void. Afterwards, Dowling, who was a purchaser claiming under the guardian's sale aforesaid, filed a bill in chancery to aid the defect, but the court held that the title could no more be sustained in equity, than at law. Such was the conclusion in *Young v. Dowling*, on a demurrer to the bill, and the opinion of Judge Caton in that case is a very able one, and deserves the attentive consideration of those who may be engaged in the examination of this question.¹

¹ Caton, J.: "In this case a very important principle is involved, which demanded and has received the most careful consideration of this court. The complainant in this case claims title to the premises in question under a guardian's sale made in 1846, under an order of the circuit court. The title in the case of *Young v. Keogh*, (11 Ill. 642,) was precisely like this in every respect, being derived under a sale made by the same guardian, and under the same decree, and made at the same time with the sale under which the complainant claims title, so that that decision applies to this case precisely the same as if it had been made upon this identical title. The court there decided that all the proceedings were regular except that the guardian never made a report of his proceedings under the order of sale, as that order had directed and the statute required. For that defect this court decided that the sale was void, and that no legal title passed to the purchaser by the deed which the guardian had executed. This court then said: 'There is no avoiding the conclusion, that the title does not vest in the purchaser till the report is made and approved. The language of the statute is so explicit and unequivocal, that it neither admits of doubt or argument.' Since the decision of that case, a trial in ejectment has been had between the complainant and defendants in this bill, in which these defendants

The same principle was applied by Judge Story, in *Bright v. Boyd*,¹ to an administrator's sale, which was void at law for non-conformity with the statute.

recovered a judgment in ejectment against the complainant, thus determining in conformity to the decision of this court in the other case, that the complainant acquired no legal title by his purchase. This bill is filed against the heirs, who were plaintiffs in the ejectment suit, praying an injunction to restrain the execution of the judgment rendered in that cause, and for general relief. The bill sets out the decree of the circuit court, ordering the guardian to sell, the fact of the sale to the complainant for the full value of the property, that he paid the purchase-money to the guardian, and took a deed from the guardian for the premises; and that, believing he had a perfect title to the premises, he took possession under his deed, and made valuable and lasting improvements on the premises of the value of \$2,500; and that he was not aware of any defect in his title till the commencement of the ejectment suit, which was after the death of the guardian, when it was impossible to compel a return of the sale to be made by the guardian, and to procure an approval thereof by the Circuit Court. It is insisted, in support of this bill, that here was the creation of a power which, in itself, was perfect and complete, but which, through the mistake, accident, or inadvertence of the guardian, was defectively exercised or executed; and that it is competent for a court of equity to relieve against, and to give him a title which, by reason of such defect, the law will not give him. Where a power is created by an individual, or the party interested in the exercise of the power, and that power is defectively executed by the agent appointed by the power to execute it, courts of equity may interfere and relieve against such defect, for the purpose of carrying out the purposes intended by the creator of the power, and the agent who imperfectly executed it. But the general rule is otherwise, where the power is created by law and without the concurrence of the party whose interests are to be affected by its exercise. Mr. Justice Story says: 'But in cases of defective execution of powers, we are carefully to distinguish between powers which are created by private parties and those which are specially created by statute; as, for instance, the powers of tenants in tail to make leases. The latter are construed with more strictness; and whatever formalities are required by the statute must be punctually complied with, otherwise the defect cannot be helped, or at least may not, perhaps, be helped in equity, for courts of equity cannot dispense with the regulations prescribed by a statute; at least where they constitute the apparent policy and object of the statute.' (1 Story, Eq. Sec. 96.) Such, in our judgment, is emphatically the case before us. Here the statute has created a power to divest infants of their estate for certain objects, specifying those objects, and prescribing the precise mode of doing it, and stating clearly what acts shall be done in order to pass the title. When the legislature created this power, it foresaw the abuse and injustice to which it was liable, and prescribed these forms for the very purpose of guarding against such abuse, and this constitutes the manifest policy of the law. Here the legislature prescribed a certain act to be done, which is the final consummation of the exercise of the power, and this last act, it has said, should

¹ 1 Story R. 478.

The cases where a power of appointment, or of revocation, which arise by construction under the statute

pass the title ; and in construing that statute, we have determined, that without that act the title did not pass. This act, from its very nature, was one of the most important acts dictated by the law, to guard against abuse, and to protect the interests of the infants, whose estate was to be taken from them without their consent. This is the statute : 'It shall be the duty of the guardian making such sale, so soon as may be, to make return of such proceedings to the court granting the order, which, if approved by the court, shall be recorded, and shall vest in the purchaser or purchasers all the interest the ward had in the estate so sold.' If there be any act prescribed by the statute which should be deemed essential to a valid execution of the power conferred by the law, it is this, which the statute says shall be the one which shall vest the title in the purchaser ; and it is this act, of all others, which is best calculated to secure the interest of the infant against the misconduct or indiscretion of the guardian, for by it the court is required to revise and examine the acts of the guardian in making the sale ; and if not fair and just in all respects, or if not in pursuance of the previous order of the court, the sale will not be approved, in which event all the acts of the guardian stand for nought. This was a wise provision of the legislature, which says, in substance, that the sale shall confer no right, and the guardian's deed shall convey no title, and that all acts done *in pais* shall remain in abeyance, till the court has examined and reviewed them, and entered its approval on its records. And yet this act, so manifestly forming a most essential element in the policy of the statute, we are asked to dispense with, because at this distance of time, and after the decease of the guardian who made the sale, these heirs may not be able to show any sufficient reason, which, in the opinion of a court of equity, would have required the Circuit Court to set aside the sale made by the guardian. The law has not vested the Court of Chancery with the jurisdiction to approve or disapprove of the acts of the guardian, but that jurisdiction was vested in the Circuit Court, which ordered the sale. If chancery may interfere and dispense with one of the requirements of the statute, it may with another, and thus, in its unlimited discretion, it may fritter away the whole statute. It is seriously claimed, that because the purchaser purchased in good faith, and paid the full value of the property to the guardian of the owners, that thereby an equity is raised in his favor and against them, which the court will enforce. Equities do not arise upon statutory acts without the volition of those against whom the equity is charged. Suppose this guardian, seeing that a case existed which would require the Circuit Court to order a sale of the infant's estate, and in ignorance of the law, but in all honesty, had sold the estate for its full value, without an order of the court, to a purchaser, who, in good faith, supposed he was getting a good title ; in that case, the purchaser's equity would be just as strong as is the equity in this case, and, should we now hold that the purchaser here acquired an equitable title, which should be enforced against the heir, it would be equally our duty, when the case supposed arises, to compel a conveyance to the purchaser, and then the entire statute would be gone. But the truth is, the purchaser at these statutory sales gets no imperfect equitable title which may be perfected in chancery ; he

of uses, where the power is required by the donor to be executed through the instrumentality of a will,

gets the whole title which the infant had, or he gets no title whatever. Undoubtedly, if at the time of the sale, the infant had but an equitable title, and subsequently acquires the legal title, that equity will compel him to convey to the purchaser such subsequently acquired legal title, but that would be upon the ground that he acquired the legal title by reason of the equitable title which had been regularly sold, and that he took the legal title simply as trustee. In such a case equity could undoubtedly enforce the trust.

Nor has the complainant here the appearance of equity against the heirs which he supposes. The case does not show that the guardian appropriated the money which he received of the complainant to the support and education of the infants, or invested it in other estate for their benefit, or applied it in any way to their use. It simply shows that he received it as guardian. Had the money been invested in other lands for the infants, it may be that it could be followed there by the complainant; and even if it were shown that the money had been applied to their support and education, there would be some reason for saying that this should affect their consciences, and require them to refund it after they became of age; but that question is not here, for it is not shown what the guardian did with the money. The complainant knew, or should have known, when he bought the land, that he got no title till the sale was reported to court and approved, and that it was his place to see that the guardian performed his duty in this regard, as in any other which was essential to the validity of his title. Suppose the guardian had omitted to make the deed, could he now be allowed to say that he supposed the guardian had performed his duty and done it, and ask this court to dispense with that essential act? The complainant was in a position to compel the guardian to make a report to the court, and thus enable that tribunal to inspect his proceedings, and see that the interests of the infants had not been sacrificed while they were perfectly powerless in his hands, and incapable of thinking or knowing or doing any thing affecting their interests. All the rights of parties thus situated are reserved, and they are to be considered as opposing and protesting against every thing which is done affecting their interests. This is a special proceeding provided by the statute, by which the title to land of third persons is divested without their consent, and not only against their will, but that, too, when they are incapable of making an effort to protect themselves; and such being the case, it was the duty of the legislature to throw every check and safeguard around the proceeding to protect the rights of the infants from becoming a prey to avarice and dishonesty. This was done by requiring the court to supervise the whole proceeding, and if all was found right and fair, to approve them, until which time all the acts which had been done were merely preliminary, having in themselves no binding effect. It was the manifest policy of the law to make the court the special guardian of the infant, to see that he was not defrauded by his general guardian or others. This policy of the law must be upheld. The statute alone created the power to sell the land, and required that it should be exercised in a particular way to make it valid, and in no other way can it acquire validity. This sale and proceeding was either conformable to the law, or it was not. If the former, it conveyed a good title; if the latter, it was illegal, and nothing. The statute

and is executed by deed, in which case equity will aid the defective execution of it, is not an exception to the general rule; though the will is not executed as required by the statute of wills, equity relieves because the deed takes effect under the instrument

says the title might be transferred in a particular way, and if done in any other way, the statute gives it no sanction, and it is void as if there were no statute on the subject. This is not a power created by a power of attorney or by will, where the court may aid a defective execution of the power, where it is necessary to carry into effect the intention of the donor of the power, whose interests were to be affected by its execution.

We are not without authority directly on this point. The case of *Bright v. Boyd*, (1 Story R. 478,) is almost precisely like this in all its essential particulars. There an administrator had, in pursuance of a statute, been authorized by the probate court to sell land left by the deceased, for the payment of debts. The statute required, that previous to the sale, the administrator should file a bond with the probate court, approved by that court. Previous to the sale, a bond was executed, by sureties, and who were approved by the court, but the bond was not actually approved by the court and filed. The administrator advertised and sold the premises, in pursuance of the order of the court, for their full value, and executed a deed, etc., and the purchasers had made valuable improvements thereon. The heir recovered the premises in ejectment, for the reason that no bond had been filed by the administrator, and approved by the court; and the bill was filed, praying that the heirs might be decreed to pay the value of the improvements, or release to the purchaser. Story, J., after advertent to the decision at law, said: 'It is now argued, that however correct this doctrine may be at law, yet in a court of equity the omission to give the bond within the stipulated time, ought not to be held a fatal defect, but it should be treated as an inadvertence, or accident, properly remediable in a court of equity. We do not think so. The mistake was a voluntary omission or neglect of duty, and in no just sense an accident. But if it were otherwise, it would be difficult, in the present case, to sustain the argument. This is not the case of the defective execution of a power created by the testator himself, but of a power created and regulated by statute. Now it is a well settled doctrine, that although courts of equity may relieve against the defective execution of a power created by a party, yet they cannot relieve against the defective execution of a power created by law, or dispense with any of the formalities required thereby for its due execution, for otherwise the whole policy of the legislative enactments might be overturned. There may, perhaps, be exceptions to this rule; but if there be, the present case does not present any circumstances which ought to take it out of the general rule. Therefore, it seems to us, that the non-compliance with the statute prerequisites in the present case, is equally fatal in equity as it is in law.' It would be difficult to find upon any question a case more directly in point, and if it be the law, of which we have no doubt, it settles the case conclusively. The decree of the Circuit Court must be reversed, and the bill dismissed."

which creates the power, and not under the will. The maxim being that every instrument made in execution of the power, refers to the instrument creating the power. The principle that equity must follow the law, and cannot supply any defect which would render a sale and conveyance void at law, for non-conformity with the statute, is peculiarly applicable to tax sales and conveyances, because of the fact, that they are regarded as titles *stricti juris*, derived under a naked statute authority. No instance is known of an attempt to make a tax title good by an appeal to a court of equity. If the reader desires to pursue this question further, he is referred to the authorities cited in the margin.¹

¹ 1 Story's Eq., Sec. 96, 177, 178; Fonb. Eq. B. 1, C. 1, Sec. 7; *Earl of Darlington v. Pultney*, Cowper R. 267.

CHAPTER XXXV.

OF THE MODE OF PLEADING A TAX TITLE.

THE rules which govern the mode of pleading a title derived under a tax sale, will, of course, depend upon the form of action, the character of the defense, or nature of the controversy in which the question arises. In real actions, and actions of ejectment, brought by the party who claims the land under such a title, and in trespass *quare clausum fregit*, and actions upon the case in tort, instituted by him for an injury to the possession or inheritance, the *general allegation of title* will be sufficient, as in ordinary cases. In trespass and cases prosecuted against him by the former owner, his title may be given in evidence under the general issue. But where he seeks, by *mandamus*, or bill in chancery, to coerce the execution of a tax deed, by the officer to whom the law has entrusted the power of making it; where he relies upon his title as a defense to an action at law, or suit in chancery; and in all cases, where a party to a suit founds his cause of action or ground of defense upon the existence of an outstanding tax title in a third person, the title must be *specially alleged* in the pleading of the party. This proposition will not be denied. But how shall this special allegation be framed? What particularity and certainty

is required by the rules of pleading in such cases? Is the general allegation that the proceedings were "in due form of law," "in *conformity* with all the provisions of the statute in such case made and provided," "regular," or "*legal*," sufficient, or must the pleader *set forth the proceedings* under which the sale of the land took place, so that the court can see that the proceedings were in conformity with the requirements of law? Pleading is defined to be, "the statement of the *facts* which *constitute* a cause of action or ground of defense." Now, what facts constitute the cause of action or ground of defense, where a tax title is relied upon? Clearly, all of those which the law has declared shall exist, in order to *consummate* a complete and perfect title. Each independent act of the officers who have anything to do with the proceedings, from the listing of the land for taxation, until the title is consummated by the execution and delivery of a deed, constitutes an essential link in the chain of title, and must be specially averred in the pleading. The rule requires that *all of the facts* upon which the *legal sufficiency* of the cause of action or ground of defense depends, shall be stated. The exceptions to this rule are, that facts of which the court will *ex officio* take notice, facts which the law presumes, and facts which come more properly from the opposite party, as being peculiarly within his knowledge, need not be stated in his pleading. Tested by the rule and exceptions, how stands the case with regard to the facts necessary to be stated in pleading a tax title? Courts will take judicial notice of the existence of other superior courts, the extent of their jurisdiction, and the course of proceedings therein; but they will not take notice of

the jurisdiction of inferior courts, or the course of their proceedings. The pleader must aver and set forth such facts as will show that they had jurisdiction, and that their proceedings were regular; nor will the court take judicial notice of the *authority* of an officer to act in a given case, but the facts which establish the authority must be averred in pleading. The courts, as has already been shown, raise no presumption in behalf of an officer entrusted with the power to sell land for the non-payment of taxes, to cover any radical defect in his proceedings; it is not a case for presuming that, as a public officer, he has performed his duty by pursuing his authority; therefore, the facts upon which his authority depends must be set forth in pleading. Nor do the facts upon which the validity of the officer's proceedings depends, lie more properly within the knowledge of the former owner, for we have seen that these facts should be *examined* by the purchaser, before he buys at a tax sale, and the evidence of them should be preserved by him as a necessary muniment of his title; therefore, all of these facts should be averred.

There is another rule of proceeding which requires, "that *facts only* are to be stated, and not arguments or inferences or matter of law." An averment that the proceedings of the officer were "regular," "legal," etc., is a mere legal conclusion, without giving the facts from which that conclusion is drawn. Therefore, in all such cases, the pleader must show, with reasonable certainty, the particular facts upon which the regularity or legality of the proceedings depend, that the court may see whether the requirements of the law have been complied with or not. For instance, where a submission requires an award to be

made in writing, under the hands and seals of the arbitrators, by a particular day, it is not sufficient in pleading the award, to allege, simply, that the arbitrators "*duly made their award*." So, where a sheriff is sued in trespass, for taking, carrying away and disposing of personal property, and he justifies under an execution, a general averment, that by virtue of a "*lawful execution*" he seized the goods, etc., is insufficient, he must set it out, or so describe it in his plea, that the court can determine whether or not the writ is a lawful one. So, where an officer is sued for false imprisonment, it is not sufficient in his justification, to state that he arrested and imprisoned the plaintiff under a "*legal warrant*," etc. So, where the proceedings of an inferior court of limited jurisdiction, are relied upon as a cause of action or ground of defense, it is not sufficient for the pleader to allege, that the proceedings were had before "*a court of competent jurisdiction and authority*," but he must aver and set forth in his pleading such facts as will show upon the record, that the court had jurisdiction over the person, subject-matter, etc. So, where a special demand is necessary, an averment that a demand was "*duly made*," is insufficient, but the pleader must show by and to whom the same was made, and the time and place of making it, in order that the court may judge. This doctrine is not opposed to Lord Coke's rule, that "*circumstances implied by law, need not be stated*." That rule simply amounts to this: In pleading a deed, it is unnecessary to allege that it was in writing, sealed and delivered; the term, deed, *ex vi termini*, means a writing, sealed and delivered, therefore if the pleader alleges that "the defendant, on, etc., at, etc., made his certain *deed* of that date, etc.,"

the law implies that it was in writing, sealed and delivered. If a feoffment be pleaded, livery of seizin need not be alleged, for it is implied in the word "*enfeoffed*." In pleading the assignment of dower in land, it is not necessary to say, that it was by metes and bounds, for it shall be intended a lawful assignment. There is no analogy between this class of cases and tax titles. If a tax deed was, by law, conclusive, or even *prima facie* evidence that the law had been complied with, then it would be sufficient to aver generally, the existence of a "*tax deed in due form of law*," for the law would imply that every preliminary fact existed, which was necessary to its validity. The words, "*tax title*," would then become the technical name of the party's *right* to an estate in fee, used only for the purpose of designating the source of the title. But it has been shown that a tax deed is not, according to the principles of common law, evidence that the preliminaries have been complied with, that no intendments are indulged in for the purpose of upholding the tax sale, that the law must be strictly complied with, in all of its requirements, and that the *onus* lies upon the party claiming under such sale, to show a compliance. The plea of performance of a condition precedent, is somewhat analogous to a pleading which sets forth a tax sale as a cause of action or ground of defense; and the rule in such case is, that the performance must be shown to have been according to the *intent* of the contract; an *exact* performance must also be stated; and performance ought to be shown with such *certainty*, that the court may judge whether the intent of the covenant has been duly fulfilled. There is another rule of pleading which requires this

degree of certainty in pleading a tax sale. Where a party claims a right unknown to the common law, but which depends entirely upon a statute for its support, he must, in pleading his title, set forth all of the facts which the statute has made essential to its validity. The statute of 27 Hen. VIII. c. 16, declares, that bargains and sales of land shall not enure to pass a freehold estate, unless the same be made by indenture, sealed, and enrolled within six months after the date thereof, in one of the courts of Westminster, etc. It has been held that in pleading a bargain and sale under this statute, the time when, and court where the enrollment was made, must be specially alleged. In pleading a deed under the statute of uses, a pecuniary consideration must be averred, for this is essential to raise an use. So, in pleading a devise of land, it is necessary to allege the seizin of the devisor, and that he, being seized on, etc., at, etc., made and published his last will and testament, in *writing*, bearing date, etc., by him *signed* and attested and subscribed, in his presence, by three credible witnesses, etc., and that after the publication of the will, the devisor died. In none of these does the law intend the validity of the bargain and sale, the conveyance under the statute of uses or the will. So, also, the declaration upon a penal statute, whether at the suit of the party aggrieved, or a common informer, must specially allege all of the facts necessary to show the title of the plaintiff to recover the penalty.

Another rule of pleading, equally well settled, is, that in all cases where a party claims title, or defends an act done under an *authority*, he must not only allege the authority, but set forth the facts which show that

the terms of the power have been pursued. Thus, where one claims title to land under a warrant of attorney, and it becomes necessary to plead his title, he must set forth the warrant, and deed executed in pursuance of it, that the court may see upon the face of the plea, that the terms of the power have been pursued. And where an officer justifies the seizure of goods and chattels, under an execution, he must not only set forth the execution, but aver that the seizure was made in the life-time of the writ, or his plea will be ill. Where the authority is special, as in the case of the sale of land for taxes, the reason is stronger for setting out the authority and acts done in pursuance of it. Another rule of pleading is, that where the validity of a title depends upon the existence of any fact *in pais*, the fact must be *specially alleged*. Thus, an heir claiming title by descent, must not only show the seizin, but the death of the ancestor and his own pedigree. One claiming title by succession must specially allege the existence of all the facts necessary to establish the validity of his title as successor, etc. So one claiming a freehold by marriage with the person seized, must allege the marriage. In pleading a dower encumbrance, the seizin of the husband, his intermarriage with the dowress, and his death, must all be averred. It would, therefore, seem that all of the acts *in pais* essential to the validity of a tax title, should be specially alleged when such a title is relied on in pleading. In pleading a *fine* levied with proclamations, it is necessary to allege the court in which, and the names of all the judges before whom the fine was levied, the term of the court, the king's license, the original writ, the concord of the parties, the number of proclamations, and the times,

place and manner of making them, the judgment of the court, and all of the proceedings essential to its validity. This is a strong case. A fine is called a *feoffment of record*, and is said by Sergeant Wilson to be "the strength of almost every man's inheritance ;" and when we remember that where a tenant in tail levies a fine with proclamations, it bars the entail, and the interest of reversioners and remainder men, unless they make claim or pursue their action within five years, the analogy between the effect of the fine and tax title becomes complete. Both, if valid, cut off all adverse interests in the land, and vest a perfect and complete title in fee simple — the one, by a fiction of law, and the other, for a merely nominal consideration. There is this difference between them, that the fine is a title of record, whereas the tax title depends upon matters *in pais*. If then great particularity is required in pleading the fine, there is greater reason for strictness in the mode of pleading a tax title. In strictness therefore, in pleading a tax title, it should be alleged, with reasonable certainty, that the land was subject to taxation ; that it had been listed, valued, and charged with the tax, in the time and manner required by law ; that the tax had been duly levied by competent authority ; that the tax list or warrant to collect had been duly delivered to the collector ; that the collector had resorted to all of the collateral remedies which the law had conferred upon him, in order to enforce the payment of the tax without resorting to a sale of the land, such as a demand of the tax, and a seizure of the body or goods of the delinquent ; that the delinquent list had been duly returned to the proper officer or court by the collector ; that the tax remained due and

unpaid; that personal notice had been given to the delinquent, where the law requires it; that a judgment had been rendered by a court of competent jurisdiction, against the land, where the law requires a judgment; that a valid precept had issued upon such judgment, and was duly delivered to the officer appointed by law to make sale of the land; that the time and place of sale was advertised in the time and manner required by law; that the sale took place at the time and place, and was made by the person and in the manner required by law; that the pleader was the purchaser, or some person under whom he claims by assignment; that a certificate of purchase was duly executed and delivered by the officer to the purchaser, and was duly recorded, etc., where such recording is requisite; that due notice to redeem had been given the owner; that the officers charged with the performance of the duty have duly returned the proceedings to the proper office, and that they were filed or recorded as required by law; that the time limited for redemption had expired; and that the officer had executed and delivered to the purchaser a deed in due form, etc., which deed had been duly recorded, etc. Such strictness is not only in conformity with the principles of pleading and the precedents in analogous cases, but is supported by express authority.

In the case of *Blakeney v. Ferguson*,¹ the bill alleged, that on November 5, 1827, the sheriff of Pulaski County "*advertised and sold for taxes, in due form of law, according to the form of the statute in such case made and provided,*" the S. W. $\frac{1}{4}$ of Sec. 17, T. 4., N. R. 9 W., etc., that one Sampson Gray then and there became the purchaser thereof, and received from such sheriff a

¹ 3 Eng. R. 277.

certificate of purchase for said land, at said sale ; that said Gray bargained and sold said land to Joseph Ferguson, with the express agreement that he would convey when he received a tax deed ; that Gray died before the execution and delivery of a sheriff's deed, and without conveying to Ferguson ; that Ferguson put his son Moses in possession of the premises under the agreement with Gray, and he was so possessed up to the time of his decease ; that Joseph Ferguson died after the making of said agreement and taking of such possession ; that Moses Ferguson was one of the heirs of the said Joseph ; and that his interest was sold to Benjamin Blakeney, by the sheriff of Pulaski, under an execution against said Moses, and that Blakeney was now seized of said interest by virtue of said sale, and a sheriff's deed executed thereon. The bill was filed by the widow and heirs of Joseph Ferguson, against the sheriff, Blakeney and the heirs of Gray, and *prayed the execution of a tax deed, by the sheriff of Pulaski, to Gray's heirs, in pursuance of the sale of Nov. 5, 1827, a specific performance, by Gray's heirs, of the agreement between Gray and Ferguson ; that complainants might be quieted in the title and possession of said land ; that partition might be made between Blakeney and complainants ; that the widow's dower might be assigned ; and for general relief.* To this bill there was a general demurrer for want of equity, which was sustained by the court, upon the ground that the *general averment* that the tax sale was in *due form*, etc., was insufficient. The court say : "The rule of law that prevailed at the time of the alleged sale, (alluding to the common law as contradistinguished from the statute then in force which made the deed conclusive evidence,) required

great strictness in the proof, and required the party claiming under the collector's sale, to show, and that fully, that every step prescribed as a prerequisite to such sale had been complied with. It is perfectly obvious that each and every step, from the assessment of the tax to the sale itself, is a separate and independent fact, and that the one has not the most remote connection with the other. It is therefore clear that, in this case, it was necessary to *allege specially* every fact essential to the consummation of the title, and that having failed to do so, they could not be permitted to support them by proof." The same doctrine was tacitly maintained in *Stead's executors v. Course*.¹ These authorities are directly in point.

In *Furness v. Williams*,² which was assumpsit by the assignee of a note against the maker, the defense was a partial failure of consideration. The plea alleged that the consideration of the note was the sale and conveyance, by the payee to the maker, of a town lot, with covenants of good right to convey, and against encumbrances. The plea alleged, that at the time of the sale and conveyance, a part of the lot, equal in value to three hundred and fifty dollars, "had been sold under and by virtue of the revenue laws of Illinois, to one Riddle, in the year 1844, for the taxes due thereon to the county and State, for the year 1843, and that two years have elapsed since said sale, and that the same has not been redeemed from," etc. There was a special replication to this plea, to which the defendant demurred, which, on writ of error brought, was sustained to the plea. Chief Justice Treat, in delivering the opinion of the supreme court, says: "The plea is *clearly bad on general demurrer*. The defense relied upon is a breach of the

¹ 4 Cranch R. 403.

² 11 Ill. R. 229.

covenants contained in the deed, and in pleading it, the defendant is held to the same strictness as in declaring in an action brought directly on the covenants. *On every principle of correct pleading, he is bound to set forth the proceedings under which the lot was sold, so that the court can see that the covenant has been broken; OR* he must make the *general averment* that the sale was *legally made, and the title thereby divested*. In this plea he does not pretend to set out the proceedings; nor does he make any allegations respecting their regularity and validity. He simply alleges that the lot has been sold under the revenue laws, without averring that the sale was duly made, or stating any facts showing that the title passed thereby to the purchaser." It will be perceived that the Chief Justice does not express an opinion as to which form of averment is the better mode of pleading; nor was it necessary, for the pleader had adopted neither in that case, but the leaning of the judge was evidently in favor of the special mode of allegation, "*that the court can see that the covenant has been broken.*" The Arkansas case was not cited in *Furness v. Williams*, by court or counsel. It may be also worthy of remark, that the revenue law, in force at the time of the sale, set up in that case, declared the tax deed to be *prima facie* evidence of some facts, and *conclusive* evidence of the others; but a judgment against the land, and precept to the sheriff, were requisite, before the deed could be read in evidence. The special averments have this advantage over general ones. If the pleadings truly state the facts, the question, as to the validity of the tax sale, may be settled by the court upon demurrer, without the expense and delay of a trial by jury; and if the facts are not

truly stated in the pleading, the existence of any particular fact may be denied by the opposite pleader, and thus the issue in fact to be tried will be narrowed down to a single point. Suppose, for example, in the Illinois case, the land had not been advertised for sale, in the time and manner required by law, and the pleader, in setting forth the proceedings, omits the averment that it was so advertised; on demurrer to the plea, the question of law is presented, whether an advertisement is a prerequisite which must be complied with, and the whole case must turn upon this point. On the other hand, suppose no advertisement was in fact made, but the pleader alleges one in his plea, the plaintiff may, by a general replication, traverse the truth of that allegation, and thus present an isolated question of fact for the consideration of the jury. Again, suppose an advertisement, but not in the *time* or *manner* required by law, a special replication and demurrer thereto may present the question of law to the court, or a general traverse, the question of fact to a jury. In every view, therefore, the special mode of allegation is preferable.

CHAPTER XXXVI.

OF THE RULES OF EVIDENCE RELATIVE TO MAINTENANCE AND
OVERTHROW OF A TAX TITLE.

WHERE the statute, under which the title originated, or which is in force at the time of the trial, is silent as to the mode of proving or disproving any fact involved in the contest, the common law rules of evidence must control the admissibility and effect of the testimony. It is a familiar rule, that the best attainable evidence shall be adduced by the party upon whom the *onus probandi* rests, to prove every disputed fact. The ground of this rule is a suspicion of fraud. If it appears, from the very nature of the transaction, that there is better evidence of the fact, which is within the power of the party, and is yet withheld from the court and jury, a reasonable presumption arises, that the failure to produce it is founded upon the knowledge of the party, that its introduction would defeat or weaken his claim of right. The rule is therefore essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely *substitutionary* in its nature, so long as the primary

evidence can be had. The rule excludes only that evidence which, upon its face, or from the very nature of the fact sought to be proven, indicates the existence of more original and reliable sources of information. Because the better evidence affords the greatest certainty of the fact in question, and removes all suspicion of sinister motives in the mind of the party, it must be resorted to in all cases.¹ And so tenacious are the courts in the strict application of this rule, that even where it clearly appears that the better evidence is unattainable, because of its loss or destruction, the next best evidence must be resorted to, thus recognizing the principle, that there are degrees in the various kinds of secondary evidence.² The application of this rule to the proof of a tax title is unquestionable. In some instances the statute law expressly requires that all of the proceedings shall be reduced to writing, and each document connected with them filed or recorded in some public office, for the benefit of all parties concerned ; and makes the original, or certified or sworn copies thereof, admissible in evidence. But independent of this, the very nature of the proceeding implies the necessity of perpetuating the evidence of every part of it in writing, and forbids a resort to the memory of man for proof of any material fact connected with it. The list, valuation, levy of the tax, the authority to collect, the return of delinquents, the advertisement, registry and certificate of sale, deed, etc., all necessarily imply that they are to be in writing, and authenticated by the proper officer. It would be utterly impossible to conduct the proceedings in any other manner. The

¹ Starkie Ev., Part 3, Sec. 10 ; 1 Greenl. Ev., Chap. 4, Sec. 82.

² 1 Greenl. Ev., Sec. 84, note ; *Mariner v. Saunders*, 5 Gilm. R. 121-4.

universal usage has been to reduce the proceedings to writing, and the authorities, either expressly or by implication, acknowledge the necessity of it.¹ If this position be true, it follows inevitably that the best evidence to prove any disputed fact involved in the investigation of a tax title, is the original document, or a certified or examined copy thereof. It has been said, that the *original* is in no case admissible, and that the party claiming under it *must* produce a certified or sworn *copy*, but it was held in *Spear v. Ditty*,² that the rate bill might be proved by the production of itself. The most usual mode of proof is by means of an office copy — i. e., by a copy made out by the officer having the legal custody of the original, and certified under his hand and seal of office.³ But an examined or sworn copy, made by a person who saw and copied from the original, is also admissible upon general principles.⁴ In no case can a private or unofficial copy in the hands of the officer who made it, or to whom it was delivered, be received in evidence in lieu of the original, if the latter is in existence.⁵

Where the original is lost or destroyed, and no certified or examined copy is in existence, parol evidence of its contents may be resorted to; but the proof of loss or destruction must be extremely clear, and the contents proved to the satisfaction of the court. But such evidence ought not to be permitted

¹ *Laird v. Heister*, *Ante*, 487, note; *Job v. Tebbetts*, 5 Gilm. R. 380; *Bruen v. Graves*, 11 Illinois R. 442.

² 8 Vermont R. 419.

³ *Parker v. Smith*, 4 Blackf. R. 70; *Coman v. State*, *Ibid.* 241.

⁴ *Graves v. Bruen*, 1 Gilm. R. 167; S. C., 11 Illinois R. 431; *Job v. Tebbetts*, 5 Gilm. R. 376; S. C., 11 Illinois R. 453; *Schuyler v. Hull*, *Ibid.* 462; *Sheldon v. Coates*, 10 Ohio R. 278.

⁵ *McCall v. Lorimer*, 4 Watts R. 351.

when there is any suspicion of a fraudulent destruction or suppression of the original. It is extremely dangerous in any case, and the *necessity* of resorting to it but seldom occurs.¹ Where the original or a copy is offered, and it appears upon the face of either that the proceeding was irregular in any respect, parol evidence is inadmissible for the purpose of supplying the defect, or in any manner to aid it by explanation.² And where the law requires the proceeding to be recorded, the title of the purchaser must stand or fall by the record itself; oral evidence being inadmissible where the officer has omitted to record the originals, or recorded them defectively.³ In all cases where office books and files are relied upon to prove a particular fact, their admissibility depends upon the following facts: 1. That the person who made it had official authority to do so. 2. That the book or document comes from the proper depository; and, 3. Proof of the identity of the book or document.⁴ It has been repeatedly held by the courts, that a mere certificate of the officer who conducted the proceedings, or in whose custody the documents connected with them are lodged for safe keeping, stating in general terms that the proceedings were regular, or that they were conducted in conformity with the requisitions of the law, is not competent evidence to prove the performance of any prerequisite. It is the duty of the officer to make a transcript of the entire proceedings, so that the court can determine, upon

¹ *Doe ex dem. Kelley v. Craig*, 5 Iredell R. 129; *Ante*, pp. 133-4; *The Proprietors of Cardigan v. Page*, 6 N. H. R. 182.

² *Lessee of Massie's Heirs v. Long*, 2 Ham. R. 287; S. C., 1-4 Ohio Cond. R. 364.

³ *Minor v. McLean*, 4 McLean R. 138; *Coit v. Wells*, 2 Vermont R. 318; *Kellogg v. McLaughlin*, 8 Ohio R. 114.

⁴ *Dikeman v. Parrish*, 6 Barr R. 210; *Doe ex dem. Kelly v. Craig*, 5 Iredell R. 129.

inspection, whether the law has been complied with or not. The officer has no power to decide upon the legality of the proceeding, nor certify to his legal conclusions. Thus, the recital of "*due notice*" in the record of a special and summary proceeding, was held insufficient to prove notice to the party in interest; the record ought to have set out the notice at length, that the court might judge of its legality.¹ So, where a stranger certified and swore that he posted the notice of a tax sale "*eight weeks*," without stating *when he first posted it*, the court held it insufficient, saying: "We cannot know how he computes time in such a case. The affidavit should state the day when the advertisement was put up, and then *we* can see whether it was put up in due season."² And in *Dunn v. Games*,³ where a question as to the validity of the listing arose, the only evidence of it was the certificate of the auditor, that the land in question was "*regularly entered on the duplicate for taxation*," and the court held the evidence of a legal listing insufficient. McLean, J.: "It is not enough that the auditor states that the listing was legally done; he must show how it was done, that the court may judge of its legality. The auditor was required to record the proceedings—it is a copy of this record that is evidence, and not a historical account of what was done." The same point was decided by the Supreme Court of the United States.⁴ In *Henry v. Tilson*,⁵ which was an action of trespass against the collector, for arresting and imprisoning a delinquent taxable inhabitant, the defendant, in his justification, set forth his return to the tax list

¹ *Rex v. Croke*, 1 Cowper R. 26; *Gilbert v. Columbia Turnpike Co.*, 3 John. Ca. 107.

² *Nelson v. Pierce*, 6 N. H. R. 194.

⁴ *Games v. Stiles*, 14 Peters R. 322.

³ 1 McLean R. 319.

⁵ 19 Vermont R. 447.

in these words: "that he had *legally* notified the plaintiff of the time and place, when and where he would receive the tax, and no goods being shown him, he arrested the body, etc." On demurrer, the plea was held insufficient. By the court: "This general statement that the collector had given the plaintiff *legal notice*, we think insufficient to show that he had given him the six days' notice required by law. It is recognized by this court, in *Briggs v. Whipple*,¹ as a well established principle, that a general allegation by a collector, that he had proceeded *according to law*, would be insufficient where any statement of his proceedings was necessary. It seems, indeed, to be well settled, that public *ministerial* officers must set forth the acts done by them, that the court, and not themselves may judge of their sufficiency." The same doctrine is held in Massachusetts, relative to the return of sheriffs upon executions.² And it was held in Vermont, that a certificate of the record of the advertisement of the tax sale, instead of a transcript of the notice, was insufficient.³ Whenever parol evidence of any fact connected with the proceedings is admissible, the officer who conducted them is a competent witness to prove the fact.⁴ Where the statute requires proof of the advertisement, by the affidavit of the printer, no other evidence is admissible.⁵ In the absence of any statutory provision, the notice may be proven by the introduction of the newspaper in which it was inserted, accompanied by proof that it was published the requisite

¹ 7 Vermont R. 18.

² *Lancaster v. Pope*, 1 Mass. R. 86; *Davis v. Maynard*, 9 Ibid. 242; *Wellington v. Gale*, 13 Ibid. 483; *Perry v. Dover*, 12 Pick. R. 206.

³ *Coit v. Wells*, 2 Vermont R. 318.

⁴ *Carpenter v. Sawyer*, 17 Vermont R. 121.

⁵ *Luffborough v. Parker*, 16 S. & R. 351.

number of times.¹ It has already been shown, that upon common law principles, the tax deed is not evidence of a compliance with the law, and that the *onus* is upon the party claiming under the tax sale; that it is competent for the legislature to change the rule, as to the *onus*, and generally to prescribe the manner of proof; and also, that *plenary* evidence is not required in proving a negative averment. Other important questions, relative to the evidence required in this class of cases, have been discussed incidentally, in preceding chapters.

This subject may be dismissed by a more particular review of the doctrine of presumptive evidence, in relation to the proof of tax sales. It has already been shown, that, as a general rule, *no presumption* can be raised in behalf of the officers, to cover any *radical defect* in their proceedings.² But it is said, by Chief Justice Marshall, in delivering his opinion in *Stead's Executors v. Course*.³ "It is true, that full evidence of *every minute circumstance* ought not, especially at a *distant* day, to be required. From the establishment of some facts, *it is possible* others may be presumed, and less than *positive testimony* may establish those facts. In this case, as in all others depending upon *testimony*, a *sound discretion*, regulated by the law of evidence, will be exercised." If the learned judge, in these remarks, simply meant, that the *best evidence* in the power of the party claiming under the tax deed, should be produced by him in support of his title, and, though it might not be positive in its character, yet, because it tended to prove the issue, should not be altogether excluded, but submitted to the jury, to be weighed

¹ *Thevenin v. Slocum*, 16 Ohio R. 519.

² *Ante* pp. 91—93.

³ 4 Cranch R. 403.

by them as in other cases, there can be no objection to the doctrine. But if, on the other hand, the Chief Justice intended to advance the opinion, that after a great lapse of time, any facts *essential* to the validity of the title, might be *presumed* from the establishment of other essential facts, the soundness of the rule is denied in its application to a case where the tax purchaser is out of possession, and is seeking to recover the land in ejectment. In such case, no presumption ought to be indulged in, to support a *stale claim*, which the party did not dare to assert in a *reasonable time* after he acquired his right — when the facts were fresh in the memory of the witnesses to the transaction; it would be unjust to the owner of the land, because the negative evidence which might be required of him, in order to repel the presumption thus raised, would be placed, by lapse of time, beyond his reach. The neglect of the party to use diligence in the prosecution of his claim, presupposes an inherent defect in it, and the claim should be looked upon with no more favor than is usually extended by courts of justice, to other *dormant titles*. This view of the case is fully sustained by the Chief Justice himself, in a subsequent opinion, where he says that the facts upon which the validity of the purchaser's title depends, "should be *examined* by him before he became a purchaser, and the evidence of them should be *preserved as a necessary muniment of title*." The same principle is laid down in *Allen v. Smith*.¹

The general rule may be thus laid down : courts will not presume any essential fact, but some degree of judgment and discretion must be exercised by the judiciary, in order to infuse a little common sense

¹ 1 Leigh R. 231.

into the principles by which tax title causes are investigated and decided. To use the language of Judge Phelps upon this point, in answer to the opposing doctrine: "It is said that no presumption is made in favor of a tax title. It is true that no essential requisite will be presumed; but to a certain extent, presumptions may and must be made, otherwise, we are driven to forced and violent presumptions the other way, which are not to be made."¹ In the preceding chapters, many instances will be noticed by the critical reader where the courts have indulged in those usual and familiar presumptions which are applied in ordinary cases, in support of a right asserted in the halls of justice. But a party who lies by for a number of years, without asserting his claim of right under a tax deed, cannot ask the court to sustain his title by presumptions.² And in *Hole v. Rittenhouse*,³ the rule is laid down, that no lapse of time will afford presumptive evidence of the regularity of a tax sale, where the purchaser, or those claiming under him, have never been in possession of the property purchased. There the deed was twenty-one years old. The older the deed, when unaccompanied by possession, the *staler* the claim, and the less favor shown to it by the courts. Where the possession is a recent one, as contradistinguished from that which is denominated, technically, an ancient one, courts will not presume the performance by the officers of any substantial prerequisite. The facts in the case of *Porter v. Whitney*,⁴ have been given already,⁵ and the tenant, who had been in possession twelve years,

¹ *Spear v. Ditty*, 8 Vermont R. 419.

² *Richardson v. Dorr*, 5 Vermont R. 9.

³ 18 Pa. State R. 305.

⁴ 1 Greenl. R. 306.

⁵ *Ante*, p. 286.

relied upon the doctrine of presumption to cure the defect in the advertisement, but the court declined to apply the doctrine to that case, saying: "The proceeding complained of was only about twelve years since, and in all *recent* cases of this nature, the courts of law have required a strict compliance with legal provisions, on the part of the collector, in the execution of his duty. In *ancient* transactions, many presumptions will be allowed; but in the case at bar, nothing is to be presumed. We have before us the fact, which shows the notice to have been irregular and insufficient; *no presumption can be made against the evidence in the case.*" This case also lays down the rule, that no presumption can be indulged in to sustain a tax title, where the evidence *clearly shows upon its face that the proceedings were irregular.* This is a self-evident proposition. It may be a question, whether a defendant, who has for a great number of years been in quiet possession of land, under a tax sale, may not call in the aid of presumptions, which would not be allowed to a person out of possession. Such is the doubtful intimation thrown out by Judge Washington.¹ The principle which governs the courts in the application of the doctrine of presumptions, for the purpose of sustaining a title to real property, is better illustrated and explained in *Tolman v. Emerson*,² than in any other reported case. The rule there laid down is, that no power will be presumed, *where the evidence of its existence is of record*, and it is immaterial whether the presumption is sought to aid one *in, or out of possession.* That case was a writ of entry. The demandant offered in evidence a deed executed by a committee of the General Court, executed December 17, 1744, to

¹ 1 Wash. C. C. R. 335-6.

² 4 Pick. R. 160.

E. Robbins and others, under whom the demandant claimed title. The tenant objected to this evidence, because the *record* of the *authority* of the committee to make the deed was not produced. It may be proper to state that the General Court constituted the legislative power of the colony of Massachusetts, and that the trial in question took place in 1826, eighty-two years after the execution of the deed. The objection of the tenant was overruled, and a verdict was rendered for the demandant. The tenant moved for a new trial, and it was granted by the Supreme Court. Parker, C. J.: "The general principle is, that where one claims under a deed or other instrument used in the conveyance of real estate, which appears on the face of it to have been executed by virtue of a power from the grantor, the power, or an authenticated copy of it, should be produced in evidence, to support the deed, in order that it may be seen whether there was authority for the act, to the extent to which it is performed. But the same principles by which deeds may be admitted in evidence, without proof of their execution, may be applied to the powers under which they purport to be executed. In either case, the deed is *prima facie* evidence of title, if possession of the premises, purported to be granted, has been taken and continued under the deed. It has been held, however, and I think justly, that this indulgence of the law, if it may be so called, is founded on the supposed loss, by death, of the regular evidence to prove the execution of the will or deed. So, that if a subscribing witness be alive, he should be called to prove the deed, although it be more than thirty years old. By analogy to this doctrine, if a power be recorded, so that the evidence

is perpetuated, there can be no reason for admitting the deed without the power, however ancient it may be, for there is certain proof to be obtained, for which a mere presumption ought not to be substituted. For the presumption is of an authority coextensive with the act; whereas the power may show a limited or more particular authority which has been transgressed; and then the case would stand upon a presumption contrary to the fact, which fact it is entirely within the power of the party to prove. The case before us is of a grant from the legislature by a committee. The authority must necessarily have been expressed and defined by a legislative act, which must of course be a matter of record, and the presumption is, that the record exists, there being no evidence of any search for it in the proper place."

In the case of *The Pejepscut Proprietors v. Ransom*,¹ which was a real action, the plaintiffs demanded 100 acres of land, counting upon their own seizin within thirty years, and upon a disseizin by the tenant. A trial was had before Judge Thatcher, at the October term, 1815. The tenant admitted the original right of the demandants to the land in question, but claimed to hold the same under a deed dated May 8, 1780, from one Ephraim Hunt, as collector or constable of Brunswick, to one Samuel Thompson, for taxes assessed on the same, as land of *non-resident proprietors*. The tenant produced the deed, and an entry by Thompson soon after its date, and also gave in evidence the copy of a record of the town of Brunswick, showing that Hunt was, at a town meeting holden May 4, 1779, chosen and sworn as constable for the year 1779. The tax bills of the town, signed by certain

¹ 14 Mass. R. 145.

persons as assessors, were also produced; *and there was some evidence which went to show a want of conformity to the requirements of the law, as to the advertisements prior to the sale.* The demandants, upon this state of facts, insisted that the tenant, in order to establish the validity of the collector's deed, should be required to prove that the collector had been duly chosen into office at a *legal town meeting, duly called for that purpose*, and that he acted by virtue of assessments committed to him by *assessors, also duly chosen at a legal town meeting* for the purpose. But Judge Thatcher ruled that, as the copy of the record of the choice of Hunt had been produced, together with the bills committed to him to collect, *it might be presumed that all the other prerequisites* for giving him authority were complied with. A verdict was returned for the tenant; the demandants filed exceptions to the opinion of the judge, which were argued by the counsel of the demandants and tenant at the May term, 1816. The case was taken under advisement, and at the May term, 1817, Chief Justice Parker stated: "That since the last term, the five justices of the court had conferred on this action, and were all of opinion that, as to the regularity of the choice of the assessors and constable, and of the proceedings of the assessors and of the constable before the sale, as to the notification, etc., *it was proper to leave the evidence to the jury, with instructions that they might lawfully presume that all things were done according to law, especially as more than thirty years had elapsed between those transactions and the commencement of this suit.*"

In *Coleman et al. v. Anderson*,¹ which was a writ of right, the tenant rested her defense on deeds from Jonathan Loveitt, constable and collector of

¹ 10 Mass. R. 105.

Windham, to Caleb Graffam, dated February 10, 1780, and from Ichabod Hanson, constable and collector of the same place, to said Graffam, dated February 14, 1780, each for sundry continental, State, county and town taxes, assessed for the years 1778 and 1779; a deed from Graffam to Jonathan Roberts, dated November 1, 1783, and a deed from Roberts to Edward Anderson, husband of the tenant, dated October 14, 1793. At what time possession was taken under these tax deeds, and by whom, does not appear from the report of the case; but it is stated, that on the 1st day of February, 1810, and for *many years before*, the demandants had been and continued disseized of the demanded premises. In support of these collectors' deeds, the tenant produced the warrants for calling the town meeting, at which the town taxes were voted to be raised, the votes of the town for raising them, the several lists of assessments, and all necessary proofs and documents to justify the said sales, excepting only the deficiencies and irregularities hereinafter stated. It is unnecessary to notice the numerous objections taken to the proceedings of the officers; many of them were substantial, while others were immaterial. Judge Thatcher, who presided at the trial, observed to the jury, that "It appearing that the transactions, constituting the tenant's title, were of almost thirty years' standing, and composed of a great variety of particulars, and such as required very different kinds of evidence to prove them, it was not to be supposed that she could at this time, produce direct testimony, or evidence of any kind, to each of them; and he believed all the law required was the proof of such facts, papers and documents, as might be considered the ground of strong presump-

tions of the existence of other facts. With regard to the notifications and advertisements required by law to be made in two public newspapers, it being proved that a notification was published in one of them, that being the *only one* which could be found, notwithstanding all due diligence was used in search of the other, it is competent for the jury to presume that a like notification was regularly published in the other, although not now to be found. And this *principle*, he observed, ought to govern them in forming their verdict, with regard to all the facts in the case." Under these instructions the jury found a verdict for the tenant. The demandants excepted and moved for a new trial. The Supreme Court confirmed the verdict, and entered judgment accordingly. Sewell, J., in delivering the opinion of the court, remarks, that "The title under which the tenant has been permitted to succeed, so far as to obtain a verdict in support of it, is of that kind almost *proverbially* denominated a *collector's title*, as expressing a case of doubt and difficulty. And collector's titles must continue dubious and difficult, in the proof and evidence required to support them, so long as they remain unassisted by any other limitation than that which applies in a writ of right in common cases of disseizin. Again, the deeds are to avail, if at all, upon the legal authority of the constables; and it was thought at the time incumbent upon the tenant to prove all the circumstances requisite in the due execution of that authority; and *this notwithstanding the length of possession under these deeds, and the long acquiescence of the parties otherwise entitled to the premises thereby conveyed.* Again, the judge who tried the cause 'as to the requisites of tax bills, valuations, warrants,' etc., was right in sub-

mitting such evidence as there was, *although incomplete*; and if the jury were *satisfied* that the *deficiencies in the evidence* were not chargeable to the *fault or negligence* of the party, that nothing in the power of the party to procure, was willfully *withheld*, the jury were very properly instructed to *consider every thing as proved*, which might be *rationaly and fairly presumed from the facts and circumstances* proved. In short, at the distance of time which had intervened between the constable's sale and the trial, it was *unreasonable* to require evidence of the particulars which the tenant in the case was put to prove, *especially* evidence from documents not intrusted with the party, or transferred with his title."

In both of these cases there was a *long and uninterrupted possession*, under the tax title; and the party in whose favor the presumption was extended, was not the original purchaser at the tax sale, but an innocent person, who, for aught that appears, had no notice in fact of the irregularities in the proceeding. And the court place the presumption upon the ground, that the jury must be "*satisfied* that the *deficiencies in the evidence* are not chargeable to the *fault or negligence* of the party," and that no better evidence within the power of the party "*is willfully withheld*." This doctrine cannot, therefore, be extended to the original purchaser, "*for he is bound to collect and preserve the evidence*" upon which the validity of his title depends; and if he has failed to do so, it is his own folly. Again, it will be observed, that the rule, as laid down in the case cited, requires good faith, and a diligent and thorough effort on the part of the person claiming the benefit of the presumption, in collecting all the evidence which can be produced,

tending to throw light upon the regularity of the original proceedings of the officers. Strict search must be made in all the offices and places, and inquiry made of all persons, for the documents and facts necessary to establish the validity of the title. The presumption is not raised for the purpose of supplying any *defect* in the doings of the officers, but to fill up the gap occasioned by a supposed loss of testimony, which, if it had been preserved, would have established, to the satisfaction of the court, the existence of the very prerequisite in question. The rule also requires, that all of the records, documents, and facts, which can be collected by the party, after diligent and faithful search, tending to establish the regularity of the proceedings, shall be submitted to a jury, and they directed to presume *only such facts* as may be *fairly and rationally presumed* from the facts and circumstances proved. This excludes every presumption which is contradicted by the facts given in evidence before the jury. Thus, suppose the list and valuation produced, and the land in controversy nowhere appears upon the list; the jury shall not be permitted to presume a listing of the land for taxation. Again, suppose it appears that the list, upon its face, is illegal and void, that it was made by a person not authorized by law to make it, or the valuation of the land is omitted; in all of these instances, the presumption is forbidden by the facts proven. Suppose, again, that the newspaper in which the notice was published, is found upon the files of the proper office, and produced in evidence before the jury, and upon its face the notice appears to have been inserted in a newspaper not authorized by law to publish the delinquent list, or, though having due authority, the

land in controversy is not embraced in the list; in these and other like cases, the presumption will be unavailing. With these limitations, no objection is perceived to the rule laid down by the Supreme Court of Massachusetts; on the contrary, it is in unison with the established principles of law, as applied in analogous cases.¹ It was held in *Read v. Goodyear*,² that where the defendant's tax deed was twenty-one years old, and he had been in possession and paid the taxes due upon the land ever since his purchase, the court would presume that the proceedings were regular in all respects. By the court: "That there must be some limit where the courts should apply the maxim, *omnia presumuntur rite esse acta*, will appear from the consideration that otherwise the longer the possession, the weaker the title. After the lapse of twenty-one years, it is almost impossible to prove a literal compliance with the act, and to exact a punctual adherence to the letter would be equivalent to saying, that a sale for taxes should not be supported. It would only be necessary to lie by until the evidence of the regularity of the sale was lost, when a recovery would be the consequence. Time would strengthen the title of the warrant holder in the same proportion that it would weaken the title of the vendee of the land. A title acquired by time alone, independently of the act of limitations, is regarded in law and equity." It is presumed that a tax title, whether good or bad, is a substantial foundation for an adverse possession, under every statute of limitation which simply bars the action and entry of the owner. There a claim of title makes the possession adverse, and no presumptions need be called in to the aid of the possessor.

¹ 1 Greenl. Ev. Sec. 20, and cases there cited.

² 17 S. & R. 350.

In *Freeman v. Thayer*,¹ the sale was made March 19, 1816, the deed bore date April 1, 1816, was acknowledged March 21, 1845, and recorded December 13, 1844. The trial took place in 1851. The statute of 1844 declared, that "in any trial at law or in equity, involving the validity of any sale of real estate for the non-payment of taxes, it shall be sufficient for the party claiming under it, to produce in evidence the collector's deed, duly executed and recorded, the assessments, signed by the assessors, and their warrants to the collector; and to prove that such collector complied with the requisitions of law as to advertising and selling such real estate." The defendant exhibited his tax deed, under which he had taken possession soon after its date, proved the loss of the assessment, and gave evidence by copy of its contents, and also proved that some of the notifications required by law had been given. The judge who presided at the trial, ruled, 1. That the rule of evidence prescribed by the statute of 1844, was applicable to this case; and, 2. "That the proceedings having taken place more than thirty years ago, if the jury were satisfied from the testimony, that there was a strong probability that all the other acts required by law had been performed, they would be authorized to presume, after such a lapse of time, that all of the proceedings had been regularly and legally conducted, but that they were not required to make any such inference or presumption; it was a matter submitted to their consideration and judgment, whether, under all the circumstances, they ought to come to such conclusion." These rulings were sustained by the Supreme Court. On the first point, the court say :

¹ 33 Maine R. 76.

"The provisions of the section quoted are general, and intended, by express terms, to apply to any trial of the description named, in law or equity, that might transpire. They may furnish a rule of evidence for subsequent proceedings in court to establish titles to real estate dependent upon sales for the non-payment of taxes; but they do not impair the obligation of contracts, or distinct vested rights, when applied to cases involving the validity of prior sales. There never was imposed upon the defendant an obligation to prove the title under which he claims, in a particular mode; nor had those contesting that title, a vested right to require that it should be supported by a particular kind or amount of evidence. The legislature had the power and the right to prescribe the evidence to be received, and the effect of that evidence in proceedings in our courts. They may prescribe and change remedies, and such regulations would not necessarily affect the obligation of contracts. It has been well said, that there is no such thing as a vested right to a particular remedy. There can be no such thing as a vested right in one to compel another to pursue a particular remedy, or to take a given time of defense in any case." On the other point, the court remarked: "It has been determined, that, after a lapse of thirty years from a collector's sale of land for taxes, it may be presumed from facts and circumstances proved, that the tax bills, valuation, warrants, notices, etc., were regular; that the assessors and collectors were duly chosen at legal meetings; that the collector was sworn; that a valuation and copy of the instruments were returned by the assessors to the town clerk, and that every thing which can be reasonably and fairly presumed, may have the force and effect of proof."

In *Farrar v. Eastman*,¹ a proprietary tax sale was sustained where it took place forty years prior to the trial, and there had been a possession for that length of time under the tax deed. By the court: "It is an ancient transaction, (almost forty years), and neither the vote of the proprietors, nor the deed under it, are drawn with any attention to legal precision. It is well known, that much of the business of these proprietors was loosely conducted, and after such a lapse of time, and for the purpose of upholding their proceedings, and of titles derived from them, and after such long acquiescence, they are to be viewed with great *indulgence*; whether, in a recent case, greater precision, and a more clear and perfect *deduction* and *pursuance* of authority, would not be required, it is not necessary now to decide. It is not essential, that all the facts necessary to sustain and justify the sale, should be recited in the deed. They may be presumed or proved *alunde*. Such as do not appear in the records, and among the papers of the proprietors, may, and after such a length of time, will be presumed."

The case of the *Lessee of Ward v. Barrows*,² was an action of ejectment, in which the plaintiff showed a regular chain of title. The defendant relied upon a tax sale and deed, the latter dated April 14, 1838. It is to be gathered from the case, that the defendant, or those under whom he claimed title, had been in possession since the execution of the deed. It was admitted that all of the proceedings connected with the tax sale were regular, except that the return of the delinquent list did not appear to have been sworn to by the collector, and certified in the manner

¹ 5 Greenl. R. 345.

² 22 Ohio (1 Warden) R. 241.

required by law. On inspection, it appeared that the list was sworn to by the collector, but there was no certificate of the auditor, in the nature of a *jurat*, that the oath was administered by him to the collector. Two questions were discussed in the Supreme Court. 1. Was the sale illegal because of this omission? and, 2. Might not the court presume that the oath had been administered by the auditor? The judgment was for the defendant, upon both grounds. On the question as to indulging in presumptions, the court remarked, after disposing of the case upon the authority of a prior decision in that court,¹ that "upon principle it is equally clear. When the duplicate was placed in the hands of the collector, he was required to be charged with the full amount appearing upon it. Upon his subsequent settlement with the auditor, he was to be credited with such taxes as he had been unable to collect, and the auditor was then required to certify upon the list the amount of money in the hands of the collector belonging to the State, county, etc., which the latter was required to pay over against a specified day. Before this credit could be allowed or certificate made, the auditor must be satisfied, by the oath of the collector, of its correctness. To have allowed the credit, or made the certificate without this, would have involved him, not only in criminal neglect of duty, but actual misfeasance. Under such circumstances, unless the statute makes written evidence indispensable, the officer will be presumed to have done his duty until the contrary appears.² The law will presume all to have been rightly done, unless the circumstances of the case over-

¹ *Winder's Lessee v. Sterling*, 7 Ohio R. 190, Part 2.

² 1 Greenl. Ev. 51; Math. on Pres. 36.

turn this presumption; and consequently, as stated by the Supreme Court of the United States, in *Bank of the U. S. v. Dandridge*,¹ "acts done which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter." Instances of the application of this doctrine under a variety of circumstances, may be found in *Williams v. East India Co.*,² *Kelly v. Connell*,³ *Wheelock v. Hall*,⁴ *Brown v. Connelly*,⁵ *Hartwell v. Root*,⁶ and *Jackson v. Shaffer*.⁷ Facts presumed are as effectually established as facts proved, where no presumption is allowed; and hence, in accordance with this long established rule of evidence, the court, in *Lessee of Winder v. Sterling*,⁸ were entirely justified in saying that the act of the auditor in allowing the credit, and making the certificate, which could only lawfully be done after the delinquent list has been verified by the collector, was presumptive proof that the oath had been administered."

The court of appeals in Virginia refused to make these presumptions in favor of a possession of twenty-two years duration. Thus, in *Allen et al. v. Smith*,⁹ which was a bill in chancery, filed by Smith, it was alleged that a grant of the land was made to Daniel Morgan, assignee of Joseph Tidball, bearing date March 9, 1796; that Morgan bargained and sold the land to Jesse Sims; that this contract was evidenced by a bond, which had been lost or mislaid; that on August 27, 1800, Sims, being embarrassed in his pecuniary circumstances, conveyed the land to John and

¹ 12 Whea. R. 70.

² 3 Dana R. 532.

³ 5 Blackf. R. 390.

⁷ 11 John. R. 513; 9 Cowen R. 110.

⁹ 1 Leigh R. 231.

² 3 East. R. 192.

³ 3 N. H. R. 310.

⁵ 19 John. R. 345.

⁶ 7 Ohio R. 190, Part 2.

Peter Wise, in trust for creditors, with a *proviso* that the creditors might take the land in satisfaction of their debts, at a certain valuation, contained in a schedule attached to the deed of trust; that Sims afterwards died insolvent; that the complainant was a creditor of Sims, and had elected to take a part of the land in satisfaction of his debt, at the value named in the schedule; that Peter Wise was dead, and that John, the surviving trustee, conveyed according to such election, by deed dated September 25, 1821; that Morgan died testate in 1802, devising the residuum of his estate, of which the land in question was parcel, to Mrs. Neville, wife of Presley Neville, of Ohio, and a daughter of the testator; that in 1818, Neville and wife conveyed to an agent of the defendants, upon a condition which never was complied with; that Neville died, and that in 1823, Mrs. Neville conveyed to the complainant, revoking the conveyance of 1818 as far as she could, by a written declaration to that effect; that on the 27th day of December, 1802, the defendants purchased the land in question at a tax sale, and received the marshal's deed therefor; that the defendants had been in possession of the premises twenty-two years under the deeds from the marshal, and Neville and wife; and that the tax sale was illegal and void. The bill prayed a specific performance of the contract between Morgan and Sims, for the delivery of possession, and an account of the rents, profits, etc. The defendants answered, setting up their tax title, under the laws of the United States, alleging the legality of the proceedings, and setting up lapse of time as a bar to any inquiry into their regularity, etc. The land was listed for taxation in the name of Tidball, the locator, instead of Morgan,

his grantee. The act of Congress authorizing the sale, required publication of the time and place of the vendue in four gazettes. No proof of the prerequisites was offered by the defendants. Chancellor Tucker rendered a decree for the complainant, saying: "The title claimed under that sale could not prevail unless the requisitions of the law were proved to have been complied with, or unless such compliance were to be presumed in favor of possession after such a length of time. No such proof was offered. And such a presumption ought not to be raised, to defeat a *legal title*, upon a mere possession of twenty-two years, counting from the date of the sale to the date of the suit; it should be more cautiously admitted, in a case where a party's rights have been sold in the name of another; and where from the nature of the requisitions of the law, the presumption of compliance with them might easily be fortified by the evidence of one at least of the many numbers of the four gazettes, in which the notification required by law, must have appeared. The requisitions of all such statutes must be strictly pursued; and no purchaser is blameless who buys without seeing that they have been so, or who has failed to preserve so essential a muniment of his title. The defendants themselves tacitly admitted the insufficiency of the title under the collector's sale, when they forfeited it by a release or conveyance from Morgan's devisee; and thus afforded decisive evidence against the presumption on which they would rely as late as 1818, about sixteen years after the sale. Therefore, the collector's deed did not convey the legal title to them." Upon writ of error, this decree was affirmed. In delivering his opinion, Judge Carr, of the Court of

Appeals, after citing and approving the rule of strictness, and that relative to the *onus* laid down in *Thatcher v. Powell*, proceeds: "Now, if the validity of the marshal's deed depends upon the performance of these acts *in pais* (advertisement, etc.); if the party claiming under such deed is as much bound to prove their performance, as he would be to prove any matter of record, on which the validity of the deed might depend; how can it be supposed, that he would be permitted to supply evidence of these acts by presumption from time, sooner than he might supply the want of the deed itself by such evidence? The *very* nature of such titles, it seems to me, ought to warn the purchaser to see that all the prerequisites of the law are complied with *ad unguem* (to a nicety). They buy often large and valuable tracts of land for a mere trifle; and they ought always to expect that the owner will attempt to recover them. This is notice intrinsic in the transaction, that they must be ready for defense; and they ought at once to collect the proper evidence of compliance with the law; and these documents being written, can be just as easily preserved as their deed." In this opinion Judge Cabell concurred — so also did President Brooke, who delivered a separate opinion, in which he expresses a doubt whether a court of equity ought even to presume any fact in support of a tax sale. A reargument of this cause was awarded, and the question discussed, whether twenty years' adverse possession, under the tax title, was not a bar to the complainant's equity, but the court reaffirmed their former decree.¹

¹ The Virginia court, in *Robinett v. Preston*, (4 Grattan R. 141,) applied the doctrine of presumption to a sheriff's sale, purporting to have been made under the authority of a judgment and execution. The only evidence offered by the tenant was the sheriff's deed, which recited a judgment, execution, advertisement, sale, etc., in the usual form, and a possession under the deed from 1816 to 1845,

The same principle was asserted by the Supreme Court of New Hampshire, in the case of *Waldron v. Tuttle*,¹ and in that case the rule is laid down, which is probably applicable to all cases where the doctrine of presumption is relied upon, that in order to justify its application, the possession of the party claiming under the tax deed must be a long, open, notorious and exclusive possession — such an one as will constitute, technically, an adverse possession. This case, was an action of trespass, *de bonis asportatis*, and it became necessary for the plaintiff to prove title to the land upon which the trespass originated. He accordingly relied upon two tax deeds, made in pursuance of sales made for the years 1780 and 1783, and proved that immediately after his purchase, he entered upon the land and ran out his lines, and continued to enter and take firewood therefrom ever since. Holmes was the officer who made the sale of 1780, and Felker that of 1783. The action was brought in 1826. The evidence was admitted, and the court instructed the jury that on account of the lapse of time, and the occupancy of the plaintiff, they might presume a performance of all legal prerequisites to a valid sale. The jury found for the plaintiff. But the Supreme Court granted a new trial, saying: "The jury were told that it was competent for them to presume, from the possession of

twenty-nine years. The court held, 1. "That on this state of facts, a legal presumption of the regular exercise of the authority of the sheriff to sell, would arise and be accepted instead of proof, even against those connected with the estate conveyed. 2. That as against strangers setting up a title adverse to that conveyed by the officer authorized to sell, the recital of such authority as set forth in the deed should be taken as true; and that it was not incumbent on the tenant, in the state of facts above set forth, to produce any additional evidence of the authority of the said sheriff to sell and convey said land."

¹ 3 N. H. R. 340.

the plaintiff, and the length of time which has elapsed since the deeds of the collectors were made, that all acts and proceedings had been duly done and had, which were necessary to the validity of those conveyances. But we are of opinion, that, under the circumstances, the possession of the plaintiff and the antiquity of the deeds, afforded no legal ground on which any such presumption, with respect to the deed of Holmes, could rest. That deed was made more than forty years ago; but it has not been accompanied by any exclusive possession. The plaintiff had occasionally entered, but the defendant, and those under whom he claims, have been constantly in possession. A possession, to be the ground of any presumption in favor of *such* a title, must be a long, open, undisturbed possession, adverse to the title of the former owner. And we are of opinion, that, in no case, can a jury be permitted to presume, from the mere production of a collector's deed, and from proof of possession under it, that the sale was legal. Very few of those sales have been found to be legal. The presumption is, in fact, against their validity. He who rests his claim to land, upon the legality of such a title, must show, affirmatively, that the *law of the land* has been substantially pursued in the sale. And in no case can he be permitted to rely upon possession as evidence, even of particular facts, until he has shown, that the common and ordinary evidence of such facts has been probably lost by time and accident, and is not to be found. In all cases, enough of the proceedings should be shown to render it not improbable that the proceedings may have been regular; and then long and quiet possession may be left to a jury, as evidence of particular facts, the

ordinary proof of which cannot be found. The deed of Felker stands on ground somewhat different. That instrument purports to convey a portion of the estate in the land in common, and it was not to be expected that the plaintiff would show any exclusive possession under that deed. But in such a case, the possession in common must be shown to have been open and known to the former owner, and to have remained long undisturbed by him, before it can be submitted to a jury, as a legal ground of presumption in favor of a collector's sale. It does not appear from the case, that the possession of the plaintiff was of this character, and we think it was improperly submitted to the jury as evidence of the regularity of the collector's proceedings." The case came before that court a second time,¹ upon the same state of facts, and the court reaffirmed the doctrine, that no presumption can be indulged in to support a tax sale.

Upon a critical review of all the decisions relative to presumptions, in this class of titles, the principles fairly deducible from them are, 1. That, ordinarily, no presumptions are indulged in for the purpose of sustaining the tax title, where the missing fact is essential in its character. 2. That presumptions, as to non-essentials, must be allowed to a certain extent, or the courts are driven to forced and violent presumptions the other way. 3. That where there has been a possession of twenty years, or for a less time, under a statute which merely bars the entry and action of the owner, the possession based upon a tax deed is sufficient to establish a claim of title, without resorting to the doctrine of presumptive evidence. 4. That a long possession under a tax deed, short of

¹ 4 N. H. R. 371.

the period fixed by the statute of limitations, is a sufficient basis for a presumption of regularity. 5. That one out of possession, but claiming under a tax title, has no right to the benefit of any presumption in his behalf. 6. That no presumption can be sustained, which is contradicted by the record and documents, connected with the proceedings, and 7. A presumption, in such cases, is never admissible, where the record or files, which evidence the existence of the proceedings, can be produced.

CHAPTER XXXVII.

OF THE TITLE WHICH PASSES TO THE PURCHASER AT A
TAX SALE.

SUPPOSE the land subject to taxation — that it was duly listed and charged with the tax — that the tax was unpaid — that all conditions precedent and subsequent to the sale have been strictly complied with — that the owner has neglected to redeem — and that a deed in due form has been executed and delivered to the purchaser — what kind of title does the grantee of the State acquire? Is it an *original*, or *derivative* one? Does it pass merely the title of the person in whose name it was listed, and on account of whose delinquency it was sold and conveyed? or is it to have the sweeping effect of divesting all prior interests in the land, and vesting in the grantee an independent and paramount legal and equitable title in fee? Does it annihilate a contingent estate? Is the dower of the wife and curtesy of the husband gone forever? Are all covenants running with the land merged in the new title? and are estates in remainder and reversion extinguished? These are questions of great practical importance to land owners, and of much interest to the profession. In *Atkins v. Hinman*,¹ Chief Justice Treat said: "The land itself

¹ 2 Gilm. R. 449.

is sold, and not a particular interest in it. If the land was subject to taxation, and the proceedings under the revenue law have been regular, and the owner has failed to redeem within the time limited by the law, then the whole legal and equitable estate is vested in the purchaser. A new and perfect title is established. This results from the paramount authority of the State to levy taxes on property within its limits, and coerce the payment by subjecting the property to sale. It is one of the necessary and inherent rights of the sovereign power." It may be proper to remark, that the question did not arise in that case, as to the effect of the sale, but only as to its regularity.

This question was discussed in *Neiswanger v. Gwynne*, which was argued on four several occasions before the Supreme Court of Ohio, on the law and equity side. The facts were, that the premises in controversy were situate in Madison County, and constituted a part of the Virginia Military District. They were entered by David Ross in 1810, surveyed in 1816, and patented in November, 1838, to Neiswanger, the assignee of Ross. The land was listed for taxation in the name of Ross, while he was the owner of the equity, and forfeited to the State for the non-payment of the tax. In 1829 the land was sold, for the arrears of tax due upon it, to Lyne Sterling, who subsequently conveyed it, by quit claim, to Gwynne, and the latter took possession under the tax title. Neiswanger instituted an action of ejectment to recover the possession of the premises. The statute under which the sale took place, declared that the "deed shall convey to the purchaser, etc., a good and valid title to the land, and such deed shall be received in

all courts of this State as good evidence of title, etc." The court, upon this statement of facts, gave judgment in favor of Neiswanger. The counsel for the defendant insisted "certainly, the deed of the State, declared to be 'a good and valid title to the land,' ought to have as much effect as that of an individual with covenants of warranty; and when land has been sold for taxes, and a patent afterwards issues to the delinquent, or his assignee, it ought, on principles of public policy, to enure to the benefit of the purchaser, and estop the defaulter from setting up his naked legal title against a fair and *bona fide* purchaser under the law." To which Birchard, J. replied: "The first question is, whether a purchaser at a tax sale, made under the act of January 9, 1827, admitting the same to be valid, acquires a better or different title than was possessed by the former owner? This question appears to have been settled in this court by the decision in *Stuart v. Parish*, where it was held that the legal title of the patentee was not affected by a sale for taxes before the patent issued. Other authorities may be found to sustain this point, but as we are satisfied with this, it is not deemed necessary to cite them. The plaintiff, then, has the legal title, and must prevail in this action. The defendant has, at best, but an equitable title. If the proceedings in the tax sale were regular, his remedy is a bill in equity. Until the tax sale is brought before us in such manner as makes it material to the determination of the cause, we cannot, with propriety, be called upon to determine its validity."¹ In accordance with this intimation, Gwynne filed a bill in chancery, to compel a conveyance of the legal title, and enjoin the

¹ 13 Ohio R. 74.

judgment in ejectment. To this bill a demurrer was interposed, which was argued and overruled. Two questions were discussed. 1. Whether a court of equity, acting within its ordinary powers, can compel the legal owner of land to convey the same to a purchaser at a tax sale, the owner, at the time of the sale, having no other than an equitable interest, but having, subsequent to the sale, acquired the legal title? 2. If the court has such power, is the case made in the complainant's bill such as to justify the execution of it? Both of these questions were answered in the affirmative. The train of reasoning adopted by the court was, that the legal title was in the United States; that Ross had an equity by virtue of his entry and survey; that his equity was subject to taxation; that the tax purchaser acquired the whole interest of Ross; that when the patent issued, the holder of it became the trustee of the person claiming under the tax title; and that a court of equity had the power, and it was its duty, to compel a conveyance to the tax purchaser or his assigns.¹ Upon the overruling of the demurrer, leave was given the defendant to answer the bill. An answer was accordingly filed, to which the complainant replied, and evidence was taken to show an irregularity in the listing of the land. The statute which declared that no irregularity in the listing should affect the title of the purchaser, has been cited already.¹ A decree was rendered for the complainant, the court deciding, 1. That when the land was sold for taxes, the conveyance, in pursuance of the sale, vested in the purchaser and his grantee, the entire title of the original proprietor; 2. That the title of Ross, when the land was sold, was

¹ 15 Ohio R. 367.

² *Ante*, p. 111.

purely equitable ; 3. That when his assignee subsequently acquired the legal title from the United States, he became the trustee of the complainant, and was bound to convey to him ; and, 4. That evidence of irregularity in the listing was not admissible under the statute. A rehearing was granted, and the cause continued. It was reargued, at the next term, when the court *dismissed the bill*, upon the ground that the complainant acquired a *legal* title by his purchase, though the patent had not been issued at the time. Caldwell, J.: " We are of the opinion that much of the difficulty in this case arises from attempting to make a tax title analogous to an ordinary chain of title. A tax title, from its very nature, has nothing to do with the previous chain of title ; does not in any way connect itself with it. It is a breaking up of all previous titles. The party holding such title, in proving it, goes no further than his tax deed ; the former title can be of no service to him, nor can it prejudice him. It was well said by counsel, in argument on this point, that a tax sale operated on the property, not the title. In an ordinary case, it matters not how many different interests may be connected with the title, what may be the particular interest of the party in whose name the property may be listed for taxation, it may be a mere equitable right ; if the land be regularly sold for taxes, the property, accompanied with a legal title, goes to the purchaser, no matter how many estates, legal or equitable, may be connected with it. And in case the person in whose name it was listed, who had but an equitable title to the land at the time of the tax sale, gets a conveyance from the person holding the legal title, he cannot avail himself of it. The land is gone, and another title has intervened.

Just so with a person holding under a purchase from the government ; until the patent issues, he can hold nothing but an equitable right, because he cannot trace his title to any original source ; but if the land be sold for taxes while his right is a mere equitable one, he cannot reclaim it, although he afterwards obtain a patent from the United States. *A majority of the court think the title created by a tax sale a legal title, and when not good at law, that a court of chancery has no power to aid the purchaser in completing his title.*" From this opinion, Judge Hitchcock dissented, remarking, that the counsel for the defendant "insists that the purchaser at the tax sale takes a legal estate ; that in such case there can be no such thing as a derivative title ; that there is no connection between the former owner and purchaser. He says the title of the tax purchaser, if any title passes to him, is under this law, a *legal title*, and the error has been fallen into by connecting the land with the title. The tax sale severs them forever. No covenant running with the land, nor warrantee, no incident to the title, as a title, passes to the tax purchaser. He takes it by another right — by a *new and independent and paramount grant*, and in his argument at the bar, he says that it is the creation of a new estate — a new fee. But if by the tax sale, a new estate — a new fee, is created, what becomes of the old estate — the old fee ? Does that still continue to exist ? Are there two estates in fee in the same land ? Now it may not be technically correct to say, that the title of the former owner *passes* to the tax purchaser. But I suppose, by the sale and conveyance, if both are regular, the title of the former owner ceases to be operative, or becomes extinct, and the tax purchaser acquires a title to the

property, exactly equal to the former owner, before the sale. If he does not occupy the same ground, or stand in his shoes, he has as good a title — a title which must defeat that of the former owner, not so much so because it is a *paramount* title, as because the title of the former owner has ceased to be operative. If not the same, it is a similar title.”

The Ohio decisions in the case of *Neiswanger v. Gwynne*,¹ present the most extraordinary commentary upon the character of tax titles, and the difficulties which a purchaser at a tax sale encounters, in courts of law and equity, in asserting a title under his purchase, to be found in the history of tax title jurisprudence. The courts of that State had invariably held, that land was taxable after it had been separated from the mass of the public land by an entry and survey, although the legal title remained in the United States, and Judge McLean had followed their decisions upon this point — indeed the argument in favor of the power of the State to tax lands bargained and sold by the government, is based upon impregnable legal grounds. 1. The taxing power of the State operates upon all property within its territorial limits, and 2. No species of property is ever to be regarded as exempt from the operation of the taxing power, unless by virtue of some positive law — such exemption can never arise by implication. Gwynne, having purchased at a sale made in the exercise of this undeniable power, in the State of Ohio — and under a statute which declared, 1. That the title to the land, both at law and in equity, should vest in him by virtue of his purchase; 2. That the deed should be conclusive evidence of his title, and

¹ Reported in 13, 15, 18 and 20, Ohio R.

3. That no error in the proceedings should vitiate his right — sought to defend his possession, held under such a title, against one who held the legal title — acquired from the United States, after the purchase at the tax sale — and a court of law tells him, we recognize only legal titles — your remedy is in chancery. He goes to the latter *forum*, and is there told, if you have any title at all, it is a legal title, and your remedy is in a court of law. The effect of the decision is to deny the power of the State to tax lands thus situated. And what renders the decision still more strange is, that the judges all agreed that in ordinary cases, the purchaser of an equity at a tax sale acquired a legal title to the land, but the contest in this case grew out of a difference of opinion among the judges, as to the application of this rule of State sovereignty, where the legal title was, at the time of the tax sale, in the Federal government. The majority held, that the case of *Ross v. Bourland*,¹ was an authority in point, where the Supreme Court of the United States held that it was within the power of a State legislature to declare that a junior patentee, whose claim was based on a prior equity, should prevail over the senior title, in an action of ejectment; and by parity of reasoning, the State of Ohio had the right to declare the title of one who purchased a simple equity, superior to that of one who afterwards acquired the legal title from the United States. On the other hand, Judge Hitchcock, in his dissenting opinion, cites *Wilcox v. Jackson*,² and draws from that case the conclusion, that where the legal title remains in the Federal government, the question whether the sale divested that legal title, depended upon the laws of the Federal

¹ 1 Pet. R. 664.

² 13 Pet. R. 498.

and not the State legislature. One, of course, is bound to respect the decisions of courts, but when those courts vacillate in this manner, upon a simple question, but little weight can be attached to their opinions and judgments. Upon principle, all of their decisions are wrong. The statute peremptorily declared the effect of the tax sale to be, that it should transfer to the purchaser a *valid title in all courts* — at law and in equity. In the action of ejectment, effect ought to have been given to the words of the law. But when the court of equity acquired jurisdiction, and it appeared that the highest court of law had refused to recognize the title of Gwynne, relief should have been given him by the chancellor, because there would otherwise be a failure of justice. Under very similar circumstances, and under laws which made a distinction in phraseology, without a real difference in substance, the Supreme Court held the holder of the legal title a trustee for the tax purchaser, and decreed a conveyance.¹ It may be added, however, that the Supreme Court of Mississippi have decided that as long as the legal title remains in the government of the United States, the land is not liable to taxation, and that no title passes to the tax purchaser.² No reasons are assigned for this ruling, and unless there is some compact between the Federal and State governments, the decision cannot be sustained upon principle or authority. It is even contended by highly respectable jurists, that the States may exercise their taxing power over the public domain of the United States within

¹ *Lessee of Wallace v. Seymour et al.*, 6 & 7 Ohio R. 313; *Stuart v. Parish*, Ibid. 204; *Renick v. Wallace*, 8 Ibid. 540.

² *Dixon v. Doe*, 23 Miss. R. 84.

their borders. In fact, it has been repeatedly urged that upon the admission of a State into the Union, she became *ipso facto* invested with the title to all of the public land within her limits. The Supreme Court of the United States have often held that lands covered by navigable waters belong to the States, and cannot be granted by the Federal authorities. When it is remembered that the power to hold land even, is an implied power under the Federal constitution, and that that government held the public lands in the North-West Territory upon a trust long since discharged, and that there are compacts and ordinances which specially exempt the public domain from taxation — which seems to be a recognition of the right of the States to tax them, but for these compacts — and when it is further remembered, that no exemption from the taxing power exists, except where expressly reserved or granted, and that the sovereignty of the State in this respect extends to all property within its territorial jurisdiction — it may well be doubted whether all of the public domain lying within the States may not be taxed, and thus the Federal government be compelled to contribute, with other landed proprietors, her share of the public taxes. By holding the lands at high prices, or reserving them from sale, the Federal government might not only retard the settlement of the new States, but deprive them of one of the greatest sources of revenue. This is a subject worthy of a more extended examination, but it is merely hinted at here because a loose opinion expressed in a former part of this work — without much reflection, and believing that such was the common opinion of the bench and bar, and the un-

derstanding of the people — has been called in question by one of the Supreme Judges of Illinois.

But to return from this digression to the question as to the nature of the purchaser's title. The point was incidentally discussed in *Dyer v. Branch Bank of Mobile*.² The plaintiff claimed, under a tax sale, the lot in question, which belonged to the State Bank of Alabama, and which was, by charter, exempt from taxation. It further appeared, that in 1845, when the tax was assessed and became due, the premises were in the possession of third persons. Two points were considered — the illegality of the sale, on account of the exemption clause in the bank charter, and the interest which passed by the sale. The first was the main question, and upon that ground the sale was held void; but upon the second proposition Chief Justice Collier remarks: "If the persons in possession in 1845, were liable to pay the tax for that year, *their interest only* could be sold to enforce its payment; and if the defendant had a *paramount title*, dating back to a time previous, its right could not be impaired by the sale. It is clear that a purchaser at a sale under judicial process, for the payment of taxes, purchases *the interest of the party whose property is sold, and not the independent and superior, or ultimate title of a third person*. This seems to us to be a proposition so clear, that it need but be mentioned to receive universal concurrence." The Pennsylvania statute of April 3, 1804, provides "that sales of unseated lands for taxes, etc., shall be in law and equity valid

¹ The author was promised the opinion of the jurist alluded to, upon this interesting question, and he would have been happy to have inserted it in a note, but it is now evident that the opinion will not be ready in time for publication in this edition.

² 14 Alabama R. 622.

and effectual, to all intents and purposes, to vest in the purchaser or purchasers of lands so sold, all the estate and interest therein, that the real owner or owners had at the time of such sale, *although the land may not have been taxed or sold in the name of the real owner.*" The construction put upon this statute is, that all prior ownerships are merged in, and divested by the tax sale — a new and independent title created — the land, and not the owner, is regarded as the debtor for the public charge imposed by the revenue laws, thus making a clear distinction between execution and tax sales. In the one, the estate itself is sold; in the other, the interest of the debtor only.¹ But in the case of *Irwin v. Bank of the United States*,² which was an action of covenant to recover a ground-rent, it appeared that James Robinson, being the owner in fee, made a perpetual lease of the land — reserving an annual rent of sixty dollars, payable quarterly — to William Nixon, his heirs and assigns. The right of receiving the rent became vested in the United States Bank, and the right of Nixon under the lease became vested in Irwin, the defendant. In 1824, the land out of which this rent issued, was sold for taxes, upon an assessment in the name of Nixon's heirs. This last fact was relied upon as an extinguishment of the rent, and consequently constituted a bar to the action of covenant. This position was denied by the court. Kennedy, J.: "The treasurer sold the *ground* merely for and on account of the taxes assessed on it, as the land of William Nixon's heirs, and not for and on

¹ Sergeant's Land Laws of Pa., 217; *Luffborough v. Parker*, 16 S. & R. 351-8; *Blair v. Waggoner*, 2 Ibid. 472; *Straunch v. Shoemaker*, 1 W. & S. 166; *McCord v. Bergantz*, 7 Watts R. 490; *Morton v. Harris*, 9 Ibid. 323; *Caul v. Spring*, 2 Ibid. 396; *Fager v. Campbell*, 5 Ibid. 288; *Collins v. Barclay*, 7 Barr R. 67.

² 1 Barr R. 349.

account of the taxes assessed on the ground-rent issuing out of it. For the purpose of raising money to pay the latter, he had not authority to sell the ground. He could only sell it to raise money to pay the taxes assessed on the ground itself, when unseated; and generally, for this purpose, it is amply sufficient. The rent, in this case, though it issued out of the ground or land, is considered as an estate altogether distinct, and of a very different nature from that which the owner of the land has in the land itself. *Each is considered as the owner of a fee simple estate.* The one has an estate of inheritance in the rent, and the other in the land out of which the rent issues. The one is an incorporeal inheritance in fee, the other a corporeal inheritance in fee; and each are made, by one act of assembly, separate and distinct subjects of taxation. There is, therefore, no reason why the collection or mode of collecting a tax assessed upon the one, shall have any effect upon the other. It would be monstrous, and the most gross injustice imaginable, to hold, where the owner of the rent has paid the tax assessed thereon, that his estate shall be extinguished, or sold afterwards by a sale made of the land, for and on account of the non-payment of taxes assessed upon it. Such a thing is wholly unnecessary, and was never intended or designed by the legislature."

The case of *Willard v. Blount*,¹ will furnish some light upon this question. The facts were, that in September, 1846, the defendant leased to one Watson a lot, at the corner of Water and Market streets, in the town of Washington, 22 feet on Water and 50 feet on Market street, for the term of ten years, to begin on the first of January, 1847, *free of rent*, in

¹ 11 Iredell R. 624.

consideration that the said Watson would erect on said lot a building, according to specifications, and deliver the said building to the defendant, her heirs or assigns, at the end of the term, in good repair, natural decay alone excepted; and the said Watson covenanted, for himself and his assigns, that, after the erection of the said building, it should be at all times insured at a valuation of not less than \$2,000, against loss or damage by fire, for the benefit of all persons having estates therein, with a condition of re-entry, in case the covenants were not complied with. In April, 1847, Watson assigned this lease to the plaintiff, in consideration of \$2,050, Watson binding himself to erect the building according to his covenant with the defendant. Afterwards, taxes became payable by virtue of an assessment, authorized by an act of the legislature, passed at its session in 1846-7. These taxes, amounting to \$13,20, were paid on a threat of distress, and under protest by the plaintiff, who demanded of the defendant the amount so paid; and, upon refusal, commenced this suit by warrant. The cause was tried on the circuit by Judge Battle, who was of the opinion that the plaintiff was not entitled to recover, and this opinion was concurred in by the Supreme Court. Pearson, J.: "By the second section, all real estate held by deed, grant or lease, or by title of dower, curtesy, or otherwise, shall be subject to the payment of public taxes, except land of the University, houses set apart for divine worship, etc. Land, then, is taxed according to its fee simple value, and whoever is owner of the land for the time being, is bound to pay the tax. If the estate is divided, by giving a particular estate to one — the remainder to another — as if an estate is limited to A. for life, or

for ten years, remainder to B. and his heirs, the valuation is assessed without reference to this division, and each must pay the tax during the time he is the owner, and enjoys the possession and pernancy of the profits. According to this general proposition, the plaintiff being the owner for the time being, and enjoying the possession and pernancy of the profits, is bound to pay the tax. The case of landlord and tenant forms an exception, *where rent is reserved*; for the rent is in lieu of the land, and the landlord is in the *pernancy of the profits of the land*, the profits of the tenant being the fruit of his own labor. Hence, in such cases, the landlord is bound to pay the tax; and if the tenant be compelled to pay, he may recover from the landlord, or may deduct the amount out of the rent. But in the case under consideration, no rent is reserved. The defendant receives nothing in lieu of the land, and the entire profits are enjoyed by the plaintiff. He, then, does not come within the reason for making the case of ordinary tenants paying rent, an exception to the general rule. Let us see how it operates. A vacant lot, worth, say \$200, is leased for ten years without rent — a building worth, say \$2,000, is erected upon it. The lessee enjoys the entire use and profits of the lot in its improved condition. The amount of the assessment, and, of course, the tax, is increased ten times. It is right that the lessee, who has the whole profit, should pay the tax; for, in fact, the lessor has parted with his entire estate for the ten years, and stands as a remainder man, and not as a landlord receiving rent. It is said the lessor will be benefited by receiving the property, in its improved condition, at the end of the term. That is true, and then he will be bound to

pay the tax ; but, in the mean time, it is manifestly unjust to require the lessor to pay tax for what he has never enjoyed ; and there is no mode of apportioning the tax, so as to show what ought to be paid for and on account of the original value, and what for the additional value ; and, upon the general rule, the plaintiff is bound to pay the tax. The English cases give no aid in deciding this question, because the land in that country is assessed upon the annual rent, and if it be not rented, upon such sum as it could reasonably be rented for ; and the statute provides that, in case tenants are compelled to pay the tax, they shall have the right to deduct it out of the rent."

It will be seen, on an examination of the foregoing cases, that no general principle can be deduced from them in regard to the nature of the interest acquired by the purchaser at a tax sale. None of them are entitled to the force of authoritative decisions. Some arose under statutes defining the effect of the sale, others contain a simple expression of the opinion of the judge who delivered the judgment of the court, and others are based upon implications arising out of the general phraseology of the statute. In those States where the tax is a charge upon the land alone, where no resort, in any event, is contemplated against the owner or his personal estate, and where the proceeding is strictly *in rem*, the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent, executed or executory, and those in possession, reversion and remainder. In such case, the tax law itself is notice to the whole world of the liability of the land for all public assessments — and every one claiming

an interest in the land, is bound at his peril, to pay the tax, and thus protect that interest from forfeiture or sale. If he neglects his duty in this respect, his title becomes extinct, and a new and independent title becomes vested in the purchaser, freed from all prior liens, encumbrances upon the former estate, and indeed of every interest carved out of the old fee. The fee of the land passes, and not the interest simply of the former owners. All that can be required of the purchaser in such cases, is to show title out of the State, prove the regularity of the proceedings, and introduce his deed, and he makes out a complete and perfect title to the fee.¹ On the other hand, where the law requires the land to be listed in the name of the owner of the fee, or of any other interest in the estate — provides for a personal demand of the tax — and in case of default authorizes the seizure of the body or goods of the delinquent, in satisfaction of the tax — and in terms,* or upon a fair construction of the law, permits a sale of the land only, when all other remedies have been exhausted — then, the sale and conveyance by the officer passes only the interest of him in whose name it was listed — upon whom the demand was made — who had notice of the proceedings, and who alone can be regarded as legally *delinquent*. In such cases the title is a derivative one, and the tax purchaser can recover in ejectment, only such interest as he may prove to have been vested in the defaulter at the time of the assessment. Any other construction of laws containing such provisions, would be in violation of the spirit which moved the legislature to enact them, and be the means of depriving innocent

¹ *Bigler v. Karns*, 4 W. & S. 137.

persons of their estates — persons who had no notice of the proceedings — and who in consequence of this omission, can in no sense be regarded as delinquent. There are no express adjudications upon this point, but such seems to be fairly implied from the course of decisions relative to the manner of listing lands, and the effect of the sale where the listing has been in the wrong name. That the law in all such cases deems a notice—actual or constructive—to the owner of an interest in the land offered for sale, a prerequisite — is manifest from the circumstance, that a publication, or personal demand of the tax, is invariably required. Take this case: A. devises an estate to B. for life, and the remainder to C. in fee; B. takes possession, and receives the rents, issues and profits of the premises during his life. At law and in equity, he is bound to pay all legal assessments upon the land. He fails to do so after notice and demand — a sale is made, and the officer conveys to the purchaser. No demand was ever made upon the remainder man for the tax, and he had no notice of its assessment. Every one would say, at first blush, that it would be a monstrous species of injustice to hold that his interest in the estate was divested by such a proceeding. Whereas, if the State never contemplated any notice at all, but exercised her sovereign power by proceeding *in rem* alone, then he and all other persons would be bound to take notice at their peril, because the State did not promise that she would give any — it being a maxim of law, “*that every person is bound to take notice, where no one is bound to give notice.*”¹

In *Finch v. Brown*,² which was an application by a widow to redeem a tract of land, in which she claimed

¹ 16 Vinor's Abr., Chap. 2; 5 Binney R. 157, 311, 313.

² 3 Gilm. R. 488.

a dower interest, and which was sold in her husband's lifetime, the court, in speaking of her right of dower, say: "Whether this right was defeated by the sale for taxes, is an important question, which we do not feel at liberty now to discuss or decide. It will more appropriately arise when she applies to have her dower assigned under the statute." This may be an important question, but it is easily answered under the statute of Illinois.¹ "No act, deed or conveyance, performed or executed by the husband, without the assent of his wife, evinced by the acknowledgment thereof in the manner required by law, shall pass the estate of a married woman; and no judgment or decree confessed or recovered against him, and no *laches*, default, covin, forfeiture, or crime of the husband, shall prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto." This statute is based upon the principle, that inasmuch as the coverture of the wife makes her dependent upon her husband, for the means necessary to protect her own interests, that no neglect of the husband to furnish those means shall, in any manner, affect her rights of property. Under these circumstances, it would be very extraordinary to hold that the widow could not redeem, because she had no vested interest at the time of the sale, and then decide that her right of dower was divested by the tax sale, on account of the *laches* of her husband, in not paying the tax and thus protect her rights in the premises. Independent of this statute, upon common law principles, she is not barred of her dower in such a case. By the common law, and English statutes in aid of it,

¹ R. S. 1845, p. 200, Sec. 14.

dower could only be barred by a divorce *a vinculo*, by eloping with an adulterer, by the attainder of her husband for treason, by detaining the title deeds from the heir, by jointure in satisfaction, by levying a fine or suffering a common recovery. This doctrine has been recognized in this country, the court holding that her own voluntary assent or misconduct was necessary to bar her right of dower, and that no *laches* of the husband could have any such effect.¹ A contrary rule would be manifestly unjust.

It was held, by the Supreme Court of Georgia, in *Doe ex. dem. Gledney et al. v. Deavors*,² under a statute which declared that taxes should "be preferred to all securities and encumbrances whatever;" that the State had a lien upon all lands for the taxes due upon them; that this lien took effect on the first day of January, in each year; and that in a contest between a purchaser at a sheriff's sale, in April, 1841, and the purchaser at a tax sale, held in December of that year, the latter had the paramount title.³ It would

¹ *Sisk v. Smith*, 1 Gilm. R. 503; *Hale v. James*, 6 John. Ch. R. 258; *Dunham v. Osborn*, 1 Paige R. 635; *Tabele v. Tabele*, 1 John. Ch. R. 45; *Smiley v. Wright*, 1 Ohio Cond. R. 447; 4 Kent Com. 50; 2 Bl. Com. 138; 1 Thomas' Coke, 475.

² 8 Geo. R. 479.

³ This being an important and well considered case, the opinion of Judge Nisbet is given at length. He said: "This was an action of ejectment. The plaintiff claimed under a tax collector's deed, and the defendant under a sheriff's deed. The sheriff's deed bears date in April, 1841, and the tax collector's deed in December of the same year. The sheriff sold the land under an execution in favor of a citizen, as the property of the defendant in execution. The collector caused the same land to be sold for the taxes due by the same defendant, assessed for that year. The question of title being before the Circuit Court, the presiding judge instructed the jury, 'that the lien or security of the State, for the tax due from the defendant in execution, for the year 1841, was destroyed by the sheriff's sale, and the subsequent sale conveyed no title, unless the jury believed that the sheriff's sale was made for the purpose of avoiding the payment of taxes due, and that the only preference that existed for said tax, was the right of the tax collector to claim out of the fund raised by the sheriff's sale.' To this charge the plaintiff in error excepted, and the question is, whether the tax due by a citizen is a lien upon his property, which can be

seem, upon principle, that the sovereign power of the State to levy and collect taxes—the nature of

enforced by a re-sale, in a case like this, where the property has been sold under a general judgment before it is returned, yet after the tax upon it has been imposed by law. The presiding judge does not seem to hold that generally taxes are not a lien, but believes that the lien was destroyed by the sheriff's sale, and that after such sale, the only way in which the State can collect her taxes is by putting in a claim upon the fund. Inasmuch as the land had been sold, the view of the judge seems to be, that the State occupied the position of a favored or preferred claimant on it, and failing to assert her claim, lost it, unless the sale by the sheriff was intended to defeat the payment of the taxes. The question is an important one, and it will be necessary to consider, generally, the question, to what extent assessed taxes are a lien upon the property of a citizen, and if they are a lien particularly, whether in this case it was, as held by the presiding judge, destroyed by the sale by the sheriff. The right to tax the whole property of the citizen for the defense of the State, and the support of the government, is not a questionable proposition. It is an incident of sovereignty. All property which vests in the citizen by grant from the State, is liable to taxation, without a reservation of the right to tax. That right grows out of the right of the citizen to governmental protection, and the corresponding obligation of government to protect him. *Revenue* is indispensable to the maintenance of all the privileges and immunities of the people; it is also indispensable to national independence, without which, individual immunities and privileges are valueless. Hence it is, that in the very nature of the social compact, as a basis upon which the foundations of government are laid, the property of the citizen is pledged for these purposes; pledged without any express declaration of a pledge. In the act of organizing a government, the pledge is implied. It is one of the elements of national being. The people who make a government, *ipso facto*, assent to it. This inherent right to lay and collect taxes, may be limited and regulated by the fundamental law, as it is by the constitution of our Union. The amount and the mode of assessment, and the manner of collecting it, lies within the legislative competency, to be arranged from time to time by law, according to the public exigencies. In this country the people impose the taxes which they pay, through their representatives, and the taxing power is not, therefore, likely to be abused. Upon these principles it has been held, in a sister State, that the taxes due, in the absence of any legislative declaration upon that subject, are a mortgage to the exclusion of any other lien or encumbrance. The decision goes upon the idea, that the obligation to support the government precedes and is paramount to every contract between citizens; and without amplifying this general doctrine, I leave it with my concurrence. However sufficient these principles may be to sustain the tax lien, we are not left to them alone. In our judgment, the laws of the State give to assessed taxes a lien which overrides every other security or encumbrance. By the fourteenth section of the Act of 1804, which is still of force, it is declared, that 'the taxes imposed by this Act shall be preferred to all securities and encumbrances whatever.' This section creates a lien. It is argued that it only gives a preference or creates a *grade* of debt, in contemplation of a contest with other securities and encumbrances.

tax laws, which are regarded as notice to all the world, of the liability of property to taxation—the

Our opinion is, that it creates a *general lien*, which attaches at the time when the property is liable by law to taxation, upon all the property of the citizen. It is true, that the phraseology of the Act might have been more plainly declaratory of a lien. But what is its effect? A legal preference, that is priority, is given to the taxes, not only over all encumbrances whatever—such as mortgages and judgments—but also over all *securities*—securities by title, as well as other securities. A deed, therefore, upon private sale, will not defeat the preference. It inhibits a sale to the exclusion of the taxes. And it can only defeat the security of a deed, upon the idea of a lien on the property. If a title by deed upon private sale, will not defeat the tax lien, a title by deed upon a judicial sale will not, *a fortiori*; for the lien of the judgment, under which the purchaser at the judicial sale gets his title, is unquestionably postponed by the Act. There is no particular form of words necessary to create a lien. The plain import of this Act is, a legal preference for satisfaction *out of the property* of the person taxed, over every security and every encumbrance, and that is a lien. The legislature, no doubt, intended simply to declare the great fundamental principle, that the *property* of the citizen is pledged, to the exclusion of all private contracts, to the support of the government. That principle elucidates the enactment. If the lien exists without a legislative declaration—if it be an elementary principle of government, recognized by the ablest statesmen—it can hardly be presumed that the legislature intended to innovate upon and weaken it. If the Act only creates a preference over other claims, it is available for the protection of the State only when a citizen is dead, and his estate is for distribution, or when he is insolvent, or when there is a fund in hand for distribution. Upon this idea, it looks to marshaling assets. And in case of the alienation, *bona fide*, of property by private sale, this construction would wholly defeat the security of the State. In this very case, as I shall show, it would defeat the collection of taxes altogether. I do not mean to say that when the money of the citizen is in the hands of the court, and the tax is in a situation to be presented as a claim upon it, that that claim would not be good. If the Act creates a lien on property, the lien equally attaches upon its proceeds. But in such a case, I do not believe that the lien of the State would be lost by its agent failing to put in a claim upon the fund, upon the principle that no *laches* can be imputed to the State. It is not enough to say, that the collector and his security would be, in that case, liable, for that liability is only a cumulative security for the State. The lien is a general one. The whole property is bound for the taxes. That it is not confined to the specific property upon which each item of the tax arises, is manifest in this. The law requires the personal estate first to be sold to pay the tax, and if none, or not enough, then the real estate. Accordingly, taxes originating on lands may be paid out of the personal estate, and *vice versa*. It takes effect when, by law, in each and every year, the property is made taxable—that is to say, on the first of January. It is the imposition of the tax by law, which appropriates, if needs be, the property of the citizen to the public use. The lien, therefore, does not commence only with the return of the property or with the return of the digest by the receiver to the collector, or with the issuing of execution to enforce

fact that all property is *impliedly* pledged for the prompt payment of all assessments, made under the

payment. It is argued that the taxes are not a lien, from certain provisions of the tax law — such as that which declares all sales, made to prevent their payment, void — that which makes them first to be paid, in case of the death of the debtor, and charges the administrator, personally — and that which charges the mortgagees with the tax due upon the mortgaged property. These provisions of law do not set aside the lien created by the fourteenth section, nor are they incompatible with it. Some of them, it may be, are unnecessary — as, for example, that which declares void all gifts and conveyances, etc., made to avoid the payment of taxes. If there is a lien, this provision is useless. All these things, and others — for example, the summary process with which the collector is armed to collect, and the prohibition of all judicial interference between the State and the debtor — look to the same end, and that is the *prompt and necessary* payment of the taxes. The State must have her revenue, at all hazards. Hence these various stringent provisions of law to constrain payment. Prompt collection is as necessary as the lien. But if, in all cases of sale of the property, as here, the State is to rely upon the fund, she may be delayed by litigation, and is really made dependent upon judicial interference. She must put in her notice, or file her injunction — await the regular time for a hearing — abide delays, continuances and collateral issues. In short, she is no better off than any other judgment creditor. No. To collect taxes, the State moves with uncontrollable power, directly and instantaneously upon the property; and if, in the exercise of this stern, but necessary attribute of sovereignty, the citizen is injured, his only redress is by petition to the legislature. In the case made in this record, if the doctrine of the court prevails, and in all like cases, the tax will be lost to the State. Here the sheriff sold in April. The land sold was taxable on the first of January, preceding. At the time of sale, the land had not been returned to the receiver — the collector knew not that it was taxable as the property of the defendant — he had no power over it, he could put in no notice to retain, he could institute no process to hold up the fund. The sheriff, officially, could know nothing of the claim of the State for taxes. He was not restrained from paying over at once the proceeds of the sale to the judgment in his hands; and if paid, then all means of security to the State is lost forever. The collector and his sureties would not be liable, for he could not be in default. So it would be in any case where there is a *bona fide* sale of property intervening the first of January and the return of the digest of taxes to the collector, whether that sale be private or judicial. The consequence of this doctrine would clearly be a loss to the State of no inconsiderable amount of her revenue, and a serious injustice to the tax-paying portion of the people. In the case before me, the collector has pursued the course which the law points out. When the tax was collectable, and default in payment made, he issued his execution — the land is levied on and sold. The question put by one of the counsel for plaintiff in error, (Col. Brown), is conclusive of the case. If these proceedings are authorized by law, (and that they are, no one questions), *does not the purchaser get a title?* If he does not, then the State has devised an ingenious piece of statutory mechanism, for the purpose of entrapping her citizens. The previous purchaser has no right to complain, for the tax lien is by public law,

authority of the constitution and laws—all necessarily concur in creating, by *implication*, a lien, without any *express* declaration to that effect.

and he is presumed to buy with notice. In the argument of this cause, the defendant in error relied upon the decision of the Supreme Court of the United States in *Conrad v. The Atlantic Insurance Company of New York* (1 Peters, 386.) That decision places a construction on the 65th section of the act of Congress, passed in 1799, which is as follows: 'In all cases of insolvency, or where any estate in the hands of executors, administrators and assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States shall be first satisfied; and any executor, administrator or assignee, or other person, who shall pay any debt due by the person or estate, for whom or for which they are acting, previous to the debt or debts due to the United States from such person or estate, being first duly satisfied and paid, shall be answerable in their own person and estate,' etc. The Supreme Court held, that the priority, thus limited in behalf of the United States, was not a right that superseded and overruled an assignment made by the debtor, and subjected the property so assigned to execution; but was a right of prior payment out of the general funds of the debtor in the hands of the assignee. This decision is inapplicable to the present case. A similar provision of law is made in this State, when a debtor for taxes dies between the time of giving in his taxes and the payment. A priority is created in behalf of the State for the tax, and the administrator is bound to respect that priority at the peril of personal liberty. If this were the only provision of our law on the subject, the question would be very different. We should construe it as the Supreme Court did a like law of Congress, as giving a right only of prior payment. But it is not. In the same section, the legislature declares that the taxes shall be preferred to all securities and encumbrances whatever. As before stated, the priority given in case of death is cumulative, and intended to secure prompt payment of taxes. The law of Congress does not pretend to give to the United States a lien—it only pretends to create a preference in the *cases stated, of insolvency*, etc. It cannot be enlarged beyond its terms. Our law, in general terms, confers a preference over all encumbrances and securities, and, as we think, creates a lien."

CHAPTER XXXVIII.

OF THE PRINCIPLE OF STARE DECISIS CONCERNING TAX TITLES.

OUR common law system, as remarked by a learned judge, consists in applying to new combinations of circumstances, those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient, to all cases which arise, and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It is of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.¹ It is said by Blackstone to be "an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being

¹ Parke, J., in *Mirshouse v. Rennell*, 1 Cl. & Fin. 546.

solemnly declared and determined, what before was uncertain, and, perhaps, indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." But this judicial rule.—*stare decisis*—like all others, has its exceptions, which will be manifest to any one who will take the trouble to examine Greenleaf's overruled cases, and count the number of decisions which have been overturned by ancient and modern courts. The *law* and the *opinion of a judge* are not synonymous terms—the latter may mistake or pervert the law of the land. Precedents ought not to be followed blindly, nor, on the contrary, treated irreverently. We owe some respect to our own opinions when deliberately formed—for conscience's sake. On the other hand, there is due to the opinions of others such a deference, as not to suppose that they acted in the formation of them, without any consideration. There is a medium ground between these two extremes which should be sought for in the application of the maxim in question. It is founded on policy—to ensure certainty, to as high a degree as possible, in the administration of justice. It is important that the decisions of our courts should be as stable and uniform as the statute law itself—indeed more so—a decision which overturns a prior one has a retroactive effect—its tendency is to disturb vested rights—whereas the promulgation of a new rule by the legislature operates prospectively only. To enable the citizen

to be governed in his social relations, and square his conduct by the laws of the land, he must know beforehand what the law requires of him. There is no difference in principle between a rule of law which is overturned by the whim of a judge — and the withholding of a knowledge of the law from the people at large. In the one case, the citizen is ignorant of the existing rule ; in the other, he is ignorant of what will be the rule when his rights are in jeopardy ; and in neither case can he possess the requisite information to enable him to protect his own interests. For these reasons, the rule is that precedents must be followed, unless flatly absurd or unjust. It is to be lamented that the limits allowed to judicial discretion in this respect, are so uncertainly defined. If a case varies from the facts and circumstances of preceding authorities, the courts are at liberty to found a new decision on those circumstances — in other words, to make a precedent. “ But it never fell from a judge in this country, that he would obey a solemn judgment in one case and not in others. This is a doctrine to which our courts are not accustomed.”¹ The discretion of judges in the application of the maxim *stare decisis*, is not an arbitrary one. “ Discretion,” said Lord Mansfield,² “ when applied to a court of law, means sound discretion, guided by law. It must be governed by rule, not by humor. It must not be arbitrary, vague and fanciful, but legal and regular.” This is the principle by which the courts are controlled in reference to precedents. A single decision upon a question is never regarded as settling a rule, unless rights have become vested under it, and it has been acquiesced in for a length of time.³ And

¹ Lord Eldon, 6 Dow R. 112.² 4 Burr. R. 2539.³ *Frink v. Darst*, 14 Illinois R. 310-312, and cases there cited.

in mere matters of practice, where propriety and utility are regarded more than the certainty of the rule, and where no one is injured by a re-examination of the question, courts do not hesitate to overrule a former decision, or even a series of decisions, when it clearly appears that they were erroneous or unjust.¹ But in questions affecting property, unfulfilled contracts, and existing instruments, the *authority of erroneous precedents seems at its MAXIMUM*. The notorious *Bewdly case*,² which was directly contrary to the act of Parliament, was sustained on this principle. When titles to real property are to be affected by erroneous precedents, they are usually sustained, however absurd. The rule is founded in policy. It is considered better to adhere to a bad rule, than overthrow the estates of many proprietors, which have been acquired upon the faith of the erroneous precedent.³

Such is the general doctrine of the courts in relation to former decisions in regard to tax titles. The Supreme Court of Vermont had decided that the neglect of the collector to lodge a copy of his proceedings in the town clerk's office, within the time required by the statute, rendered the sale void.⁴ The question was again before the court, many years afterwards, in *Taylor v. French*,⁵ and the court was asked to overrule *Mead v. Mallet*, to which the following reply was made: "On the faith of this construction numerous estates in land have been bought and sold, and it would be productive of great injustice to disturb it. This construction having become a *rule*

¹ *Bowers v. Green*, 1 Scam. R. 42; *Kenny v. Greer*, 13 Illinois R. 432; *Little v. Smith*, 4 Scam. R. 400.

² 1 P. Wms. 207.

³ 4 Burr. R. 2580; *Broom's Legal Maxims*, 112.

⁴ *Mead v. Mallet*, 1 D. Chip. 239.

⁵ 19 Vermont R. 49

of property, it should not be changed without an imperious necessity, whatever we might think of it, were it *res integra*." In *Bellows v. Elliot*,¹ the same maxim was applied in another tax title cause. The Supreme Court of New Hampshire had decided that a sale of land, in unorganized townships, should be in conformity with a statute passed in 1791, instead of one enacted in 1794. It was a doubtful question which statute was applicable, and the question again came before the court in *Bellows v. Parsons*,² and the former decision was adhered to, the court saying: "Where a question has been settled by the decisions of this court, as to the construction of a statute relating to conveyances of real estate, and conveyances have been made for a series of years in conformity to such decisions, the court will not go into a revision of such decisions, though the grounds assigned for them may not be fully satisfactory; or, if it were a new question, they might incline to a different conclusion." The Supreme Court of Ohio thus commented on the rule in *Hannel v. Smith*:³ "Whether, as a matter of policy, the strictness with which tax sales have been scrutinized, has been most conducive to the public good, is questionable. But if this court have been too rigid in this respect, the legislature can easily apply a proper remedy; and many of the arguments of plaintiff's counsel would be much more applicable unto a legislative body, than to a judicial tribunal. Where a principle of law has been established by a long course of judicial decisions, it should not be changed for light and trivial reasons. It does not so much matter what the law is, as that it should be well understood. A change of the law by the

¹ 12 Vermont R. 569.² 13 N. H. R. 256.³ 15 Ohio R. 134.

legislature can do but little harm, as their acts are only *prospective* in their operation; but a change of decisions by this court, interferes with previously acquired rights. Our decisions, in this respect, have a *retrospective* operation." And in *Games v. Stiles*,¹ Judge McLean thus spoke of rights derived under these tax laws: "There can be no class of laws more strictly local in their character, and which more directly concern real property, than these. They not only constitute a *rule of property*, but their construction by the courts of the States, should be followed by the courts of the United States, with equal, if not with greater strictness than any other class of laws."

¹ 14 Peters R. 322.

CHAPTER XXXIX.

OF TAX TITLES AS THE FOUNDATION OF AN ADVERSE POSSESSION UNDER THE STATUTES OF LIMITATION.

At common law, there was no limitation as to the time of commencing a suit,¹ and now a party is not bound to sue immediately for any injury he may sustain. He may consult his own convenience as to when he will assert his rights, provided he is not barred of his remedy by the statutes of limitation, or neglects to assert his rights for such a length of time as to raise the presumption of an abandonment of his claim, and an extinguishment of his cause of action.² But there must be a period of time fixed by positive law, within which a right shall be prosecuted in courts of justice. Public policy demands the enactment of such laws, and they are universally sanctioned by the practice of nations, and the consent of mankind; especially those which give peace and confidence to the actual possessor and tiller of the soil. Such laws have been emphatically and justly denominated statutes of repose. The best interests of society require that causes of action should not be deferred an unreasonable length of time. This remark is peculiarly applicable to land titles. Nothing so much retards

¹ Co. Litt. 115, b.² *Watkins v. White*, 3 Scam. R. 549.

the growth and prosperity of a country as insecurity of titles to real estate. Labor is paralyzed, when the enjoyments of its fruits are uncertain; and litigation without limit produces ruinous consequences to individuals.¹ The principle upon which these statutes are based, is derived from the natural law. This position is sustained by the unanswerable argument of Vattel.² The *usucapio* and *prescriptio* of the civil

¹ *Bradstreet v. Huntington*, 5 Peters R. 407; *Hawkins v. Barney's Lessee*, *Ibid.* 457.

² Law of Nations, B. 2, Chap. 11. "Nature has not herself established a private property over any of her gifts, and particularly over land; she only approves its establishment for the advantage of the human race. On this ground, then, it would be absurd to suppose that, after the introduction of domain and property, the law of nature can secure to a proprietor any right capable of introducing disorder into human society. Such would be the right of entirely neglecting a thing that belongs to him, of leaving it during a long space of time, under all the appearances of a thing utterly abandoned, or not belonging to him — and of coming at length to wrest it from a *bona fide* possessor, who has, perhaps, dearly purchased his title to it — who has received it as an inheritance from his progenitors, or as a portion with his wife — and who might have made other acquisitions, had he been able to discover that the one in question was neither solid nor lawful. Far from giving such a right, the law of nature lays an injunction on the proprietor to take care of his property, and imposes on him an obligation to make known his rights, that others may not be led into error; it is on these conditions alone that she approves of the property vested in him, and secures him in the possession. If he has neglected it for such a length of time that he cannot now be admitted to reclaim it, without endangering the rights of others, the law of nature will no longer allow him to revive and assert his claims. We must not, therefore, conceive the right of private property to be a right of so extensive and imprescriptible a nature, that the proprietor may, at the risk of every inconvenience thence resulting to human society, absolutely neglect it for a length of time, and afterwards reclaim it, according to his caprices. With what other view than that of the peace, the safety, and the advantage of human society, does the law of nature ordain that all men should respect the right of private property in him who makes use of it? For the same reason, therefore, the same law requires that every proprietor who, for a long time, and without any just reason, neglects his right, should be presumed to have entirely renounced and abandoned it. This is what forms the absolute presumption (*juris et de jure*,) of its abandonment — a presumption upon which another person is legally entitled to appropriate to himself the thing so abandoned. The absolute presumption does not here signify a conjecture of the secret intentions of the proprietor, but a maxim which the law of nature ordains should be considered as true and invariable — and this with a view of maintaining peace and order among men. Such presumption, therefore, confirms a title as firm and just as that of property itself, and established

law was the simple application of the law of nature to the affairs of civil society. The English law of prescription relative to incorporeal rights was borrowed from the civil code. Courts of equity refuse to enforce a stale claim by analogy to the natural and civil code, and usually adopt the period of time fixed by statute, for the limitation of actions in courts of law. The statutes of limitation recognize the principles of natural justice, but fix an *arbitrary* period of limitation according to the local wants of

and supported by the same reasons. The *bona fide* possessor, resting his title on a presumption of this kind, has, then, a right which is approved by the law of nature; and that law, which requires that the rights of each individual should be stable and certain, does not allow any man to disturb him in his possession. The right of *usucaption* properly signifies that the *bona fide* possessor is not obliged to suffer his right of property to be disputed, after a long-continued and peaceable possession on his part; he proves that right by the very circumstance of possession, and sets up the plea of prescription in bar to the claims of the pretended proprietor. Nothing can be more equitable than this rule. If the claimant were permitted to prove his property, he might happen to bring proofs, very convincing, indeed, in appearance, but, in fact, deriving all their force only from the loss or destruction of some document or deed which would have proved how he had either lost or transferred his right. Would it be reasonable that he should be allowed to call in question the rights of the possessor, when, by his own fault, he has suffered matters to proceed to such a state, that there would be danger of mistaking the truth? If it be necessary that one of the two should be exposed to lose his property, it is just it should be the party who is in fault. It is true that, if the *bona fide* possessor should discover, with perfect certainty, that the claimant is the real proprietor, and has never abandoned his right, he is bound in conscience, and by the internal principles of justice, to make restitution of whatever accession of wealth he has derived from the property of the claimant. But this estimation is not easily made, and it depends on circumstances. As prescription cannot be grounded on any but an absolute or lawful presumption, it has no foundation, if the proprietor has not really neglected his right. This condition implies three particulars. 1. That the proprietor cannot allege an invincible ignorance, either on his own part, or on that of the persons from whom he derives his right. 2. That he cannot justify his silence by lawful and substantial reasons. 3. That he has neglected his right, or kept silence during a considerable number of years, for the negligence of a few years being incapable of producing confusion, and rendering doubtful the respective rights of the parties, is not sufficient to found or authorize a presumption of relinquishment. It is impossible to determine, by the law of nature, the number of years required to found a prescription; this depends on the nature of the property disputed, and the circumstances of the case."

the State or nation, by the authority of which they were enacted. It is said that "prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation over all persons and property within its jurisdiction."¹ These statutes, though in terms, acting upon the remedy alone, *indirectly* bar the right. A right without a remedy is unknown to the common law. Yet these statutes are held to be constitutional. When prospective in their operation, they are not considered as impairing vested rights, or the obligation of contracts. They rather establish, that a certain lapse of time shall amount to evidence of a transfer of property, or the performance of a contract, than to take away the one, or dispense with the other. In prescribing the evidence which shall be received in its courts, and in giving effect to that evidence, a State is clearly within the limits designated by the constitution of the United States. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend upon the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment.²

Those statutes which act *directly* upon the right, are more questionable, but still their validity may be sustained upon principle and authority. There is a statute of Illinois of this character which has given

¹ *M'Elmoyle v. Cohen*, 13 Pet. R. 312.

² Angell on Lim., Chap. 2, Sec. 11, and authorities there cited.

rise to much discussion and litigation. The act is entitled "an act to quiet possessions and confirm titles to land," approved March 2, 1839,¹ and was incorporated in the revised code of 1845, under the title "*Conveyances*."² It does not purport to bar the entry and action of the owner, but declares, that a person in possession of the land under claim and color of title made in good faith, and who shall continue in possession for seven years, and during that period shall pay all taxes assessed upon the land, "shall be held and adjudged to be the legal owner of said land to the extent and according to the purport of his or her *paper* title." Another section provides, that "whenever a person, having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her *paper* title." The act contains the usual saving of the rights of infants, etc. Judge Pope of the District Court of Illinois, held the law to be unconstitutional, in *Arrowsmith v. Burlingim*,³ which led to a discussion of the question by contributors to the periodical just cited.⁴ Afterwards, Judge Drummond, the successor of Judge Pope, decided in favor of the constitutionality of the statute; and such is the *implied* opinion of the Supreme Court of Illinois, as they have enforced the law on one occasion, and on others, discussed questions relative to its construction, without denying its validity.⁵ It is the practice of

¹ Laws 1838-9, p. 266.

² R. S. 1845, p. 104.

³ Western Legal Observer, 1849, p. 46.

⁴ Ibid. 97, 129, 289.

⁵ *Irving v. Brownell*, 11 Illinois R. 402; *Spellman v. Curtemius*, 12 Ibid. 409; *Cole v. Pennoyer*, 14 Ibid. 158; *Rawlings v. Barley*, 15 Ibid. 178.

all courts to give to this class of statutes a liberal construction.

Having premised thus much, let us proceed to the application of these general principles, and of particular statutes, to rights and possessions originating under tax titles. This subject must be considered in reference, 1. To general statutes of limitation, and, 2. To statutes, which in terms, embrace no other cases, but which were designed to give security to the possession of those who claim under this class of titles. It is enacted, by the statute, 21 Jac. 1, c. 16, "that no person or persons shall, at any time thereafter, *make any entry* into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which should thereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made."¹ The principle of this clause has been adopted by most all of the American States. The Illinois statute of February 10, 1827, (and which took effect June 1, 1827,) declares, "that no person who now hath, or hereafter may have, any right of *entry* into any lands, tenements or hereditaments, shall make any entry therein, but within twenty years next after such right shall have accrued, and such person shall be barred from any entry afterwards." Another section bars all real, possessory, ancestral or mixed actions, or writs of right, for the recovery of such lands, etc., after the expiration of twenty years from the time the title, right or cause of action accrued. This statute contains a saving clause in favor of infants, *femes covert*, lunatics and non-residents of the State,

¹ Cruise Dig. Tit. 31; Prescription C. 2 Sec. 14.

giving them twenty years, respectively, to make their entry, or bring their action, after the removal of their disabilities.¹ It will be perceived, on an examination of the English statute, and the first section, above quoted, of the Illinois statute, that they simply bar the right of the owner to enter upon his land. An action of ejectment is a possessory remedy, and only competent when the plaintiff may enter; therefore it is necessary for the plaintiff to show his right to enter, by proving a possession within twenty years, or account for the want of it, under some of the exceptions contained in the statute. He must show a right of possession, as well as a right of property. Such is the theory of this class of statutes.² This doctrine is to be taken with this qualification, the land in question must be in the adverse possession of another. A legal title draws to it a legal seizin, or possession. A naked possession is no evidence of title, except as against strangers. Every possessor is, therefore, presumed to be in possession in subordination to the title of the rightful proprietor. These legal principles and presumptions give rise to the doctrine of adverse possession. To repel the presumption of a holding under, or in privity with, the title of the true owner, it is essentially necessary that the tenant of the freehold should show a possession under claim and color of title — under an apparent right. Indeed, an adverse possession is nothing more nor less than a possession under claim and color of title. It need not be a *rightful* title — else the statutes of limitation are unavailing and

¹ Laws 1827, p. 285, Sec. 6 and 7. By the act of February 11, 1837, the saving clause is repealed, as to non-residents who do not labor under any other disability named in the act of 1827. Laws 1836-7, p. 160.

² *Taylor v. Horde*, 1 Burr. R. 60.

useless. The occupant can defend upon his title — without resorting to the bar of the statute. It is, therefore, held, that any evidence, *written* or *oral*, which gives color to the claim of the tenant, will repel the presumption that he holds the possession under the true owner. Anything which clearly defines the extent of the claim, which professes to pass the land, and is not obviously defective, will constitute the basis of an adverse possession. That it need not be *written*, is manifest from the fact, that *parol* gifts, disclaimers by tenants, and an expulsion of a tenant in common, and an exclusive possession for twenty years afterwards, may be the foundation of an adverse possession. And when written evidence of claim is relied on, it need not purport to carry the *legal* title. Thus a contract for a conveyance, or a deed without a seal has been held to be sufficient. It has been said that the title must be *prima facie* good. This cannot be true, for a deed from one who has no title will answer the purpose. So of a deed which purports upon its face to have been executed under an authority, although the power is not produced or proven. All that can be demanded, is a title, which does not upon its face show that it is illegal and void, so as to charge the person in possession, with notice of its defects, and thus render his claim *mala fide*. The conclusion from this course of reasoning is, that a possession taken in good faith, under a claim of title, which upon its face gives color, or apparent right to the claim under which the entry was made and continued, renders it adverse to the owner. The only exceptions to this rule are those cases where a tenant enters in privity with the title of the proprietor,

but afterwards places himself in a hostile attitude, and claims to hold the possession in his own right, and in exclusion and defiance of the person under whose title he entered. Such cases arise occasionally between landlord and tenant, mortgagor and mortgagee, vendor and vendee, trustee and *cestui que trust*, and tenants in common. Where this relation exists, *any* hostile holding is in *bad faith*, yet a positive disclaimer of the title of the person under whom the entry was made, or actual ouster by one tenant in common, which is brought home to the knowledge of the party in interest, accompanied by an actual, open, notorious and exclusive possession, for the period of twenty years, will render the possession adverse, and bar the entry of the rightful owner. The adverse possession, in this class of cases, is based upon a claim of title by estoppel, and a counter presumption which repels the idea of a subordinate possession. In all cases, a possession, to be adverse, must be hostile in its inception, open, exclusive and uninterrupted, for the space of twenty years.

Having premised thus much, let us proceed to examine into the doctrine of adverse possession when founded upon a tax title. It may be laid down, as a general rule, that a possession for twenty years, under a tax deed, not void upon its face, is adverse, and bars the entry of the former owner and those claiming under him, for the simple reason, that it repels the presumption that the possessor entered under the owner, and bears upon the face of the transaction, evidence that he claims under a hostile source of title — the State, which has competent power and authority to sell and convey the title of delinquent tax-payers. If the tax deed relied upon in a given case is declared by law

to be conclusive, or even *prima facie* evidence of title in the purchaser at the tax sale, then all of the authorities concede the correctness of the position assumed; and the only question which can possibly arise is, in relation to possession under tax deeds which depend upon the rules of the common law for their legality — where the *onus probandi* rests upon the purchaser to prove, step by step, the *authority* of the officer to sell and convey — in other words, to establish by *extrinsic* evidence, a compliance with all of the requisitions of law. On this point, it may be remarked, 1. That such proof would establish a *paramount* title, and the statutes of limitation would be an unnecessary prop to sustain the possession; 2. The statute bars the *entry* of the former owner in twenty years, and the only question is, whether the tax deed confers a claim upon and gives color of title to the possessor. Let this question be answered by the authorities. In *Dresback v. McArthur*,¹ a tax deed, which was not evidence of title, was held to be admissible in evidence for the purpose of defining the boundaries of the purchaser's claim, and thus establish the *extent* of his possession. And in *Waldron v. Tuttle*,² in speaking of the effect of a tax deed, the court remarked: "There are cases in which a deed thus inoperative as an instrument of conveyance, may be evidence as to the extent and character of the possession. Thus, it being a presumption of law, that he who enters under a deed, enters claiming according to his deed, and that his possession is adverse to all other titles, when a party relies upon an adverse possession against the legal title, a deed by which nothing passed, may be evidence of the

¹ 6 & 7 Ohio R. 307.² 4 N. H. R. 371.

extent and character of his possession.”¹ But the case of *Hearick v. Doe*,² is in point upon this question. It was an action of ejectment by the defendants in error against the plaintiffs in error. The plaintiffs, in the court below, deduced a title from the United States, and rested their case. The defendants below relied upon the following facts: that the land in question was taxed for State and county purposes in the year 1824, as non-resident land; that on June 8, 1824, a precept was issued to the collector, and was placed in his hands July 17, 1824; that the land was sold by the collector to Abner Clarkson, September 9, 1824, who received a certificate of the sale; that Clarkson assigned the certificate to one Humphrey, July 9, 1828, who assigned it to one McIntire, July 15, 1828, who assigned it to Stephen and Frisby Hicks, September 9, 1828, who on that day received a tax deed from the collector, and on September 3, 1835, they conveyed by deed to James Hearick. There was evidence tending to show, that McIntire took possession in the summer of 1828; that the Hicks were in possession in the fall of that year, and commenced building a mill on the land, which they completed in the fall of that year, or the spring of 1829; that they continued in possession until they sold to James Hearick, when he took and continued in possession of the land until his death; and that the defendants below had been in the peaceable possession of the land from the death of James until the time of the trial. The statute of 1824, made the tax deed evidence of the regularity of the collector’s

¹ It was, however, said in *Wallingford v. Fiske*, (24 Maine R. 386), “That a tax sale and deed being void, could give no rights whatever; they were as ineffectual to give *seizin*, as they were to convey title.”

² 4 Porter Ind. R. 164.

doings alone, and not of the anterior proceedings. It further appeared, that Isaac Dunn was one of the *mesne* grantees from the United States, under whom the plaintiffs claimed title, and that at the time of the conveyance to Dunn, the premises were in the possession of the defendants below, who claimed under the tax deed. Upon this state of facts, the defendants below, (plaintiffs in error), requested the court to instruct the jury as follows, to wit: "1. That if the jury believed, from the evidence, that the defendants had possession of the land in question, by virtue of a sale of it for taxes, and had a deed, although the previous and intermediate steps, from the assessment of the land for taxation, to the making of the deed by the collector, were not proved, it was sufficient to constitute an adverse possession. And if the jury further believe, from the evidence, that said defendants, and those under whom they hold, had been in such adverse possession of said land, more than twenty years before the commencement of this suit, they should find for the defendants. 2. That if the jury believe, from the evidence, that the defendants were in the possession of said land, holding the same by virtue of a sale for taxes, and claiming it as their own at the time of the conveyance of *Piatt*, and the *Dunns* and others, to *Isaac Dunn*, in that case, the deeds from *Piatt*, and the *Dunns* and others, to *Isaac Dunn*, are void, and said *Isaac Dunn*, as one of the lessors of the plaintiff, cannot recover in this suit." These instructions were refused, and the court instructed the jury as follows: "That the collector's certificate of sale is not evidence to prove that the land was advertised for sale, as required by law; and that, if there is no other

evidence of such advertisement, the tax title is void." The opinion of the court was delivered by Davison, J.: "The question presented by the record is, did the court err by refusing the instructions moved by the defendants below? These instructions should have been given. They assume positions which are obviously correct, and are pertinent to the defense set up. It was shown by the evidence, that *Stephen and Frisby Hicks* entered upon the land in dispute, in the year 1828; and that they, and those claiming under them, have been in the continuous possession of it ever since. Their entry appears to have been made in good faith, under an assertion of right, and a title which they believed to be good. To constitute an adverse possession a rightful title is not required. It has been said, that 'whenever this defense is set up, the idea of right is excluded; the fact of possession, and the *quo animo* it was commenced and continued, are the only tests.' The title under which the defendants held was not a nullity. It was derived from a collector's sale, and a deed made in pursuance of that sale. The land in question was assessed for taxation for the year 1824, as non-resident land, and a precept commanding the collection of taxes for that year, was regularly issued and placed in the hands of the collector. The deed was made pursuant to an act of 1824,¹ and under that act it was, at least, *prima facie* evidence that the collector had done his duty relative to the sale.² In this view, it is evident that the defendant's title, although it may have been defective and not rightful, was still sufficient to support a possession adverse to the title of the plaintiff's lessors. It seems to us that an adverse possession in the defendants is

¹ See R. S. 1824, Sec. 12, p. 344.

² *Doe v. Himelick*, 4 Blackf. R. 494.

fully established by the evidence; but whether it commenced within twenty years next before the commencement of this suit, was a question which should have been left to the jury, in accordance with the first instructions moved by the defendants. The possession of the defendants being adverse at the time the several deeds were executed and delivered to *Isaac Dunn*, it follows that these deeds are void. The law is settled, that where land is held adversely, the party out of possession, although his right may be valid, is incapable of conveying to another." The judgment was accordingly reversed. On reading the opinion, it will be seen that the plaintiff's title was defeated. 1. Because the premises were in the adverse possession of the defendants at the time of the conveyance to Isaac Dunn; and 2. Because their right of entry was barred by the statutes of limitation.

The Illinois statute of January 17, 1835, declares, "that hereafter no person who now has, or hereafter may have, any right of entry into any lands, etc., of which any person may be possessed by *actual residence* thereon, having a *connected title in law or equity deducible of record*, from this State or the United States, or from any *public officer*, or other person, AUTHORIZED by the laws of this State to sell *such land for the non-payment of taxes*, or from any sheriff, marshal, or other person, AUTHORIZED to sell such land on execution, or under any order, judgment or decree of any court of record, shall make any entry therein, except within *seven years* from the time of such possession taken," etc. The same statute barred all actions, real, possessory, ancestral and mixed, and writs of right under similar circumstances. The statute also provided, that

where the possessor acquired his title after taking possession, the limitation should begin to run from the time of acquisition; and also that the possession should be a continuous one in order to bar the entry or action of the rightful owner; and also that the heirs, devisees and assigns of the original possessor, might connect these fragmentary possessions so as to make one continuous possession. And the law also gave to infants, married women, insane persons, those imprisoned, and those out of the limits of the United States, and in the employment of the State or United States, seven years to make their entry or institute their suits, after the time when their respective disabilities ceased. The act took effect by its terms, June 1, 1835.¹ It was decided by the Supreme Court of Illinois, that this statute was prospective in its operation, and that the bar did not attach unless the possession continued seven years after it took effect, June 1, 1835.² And it was held in *Moore v. Brown*,³ that seven years' possession, under a tax deed void upon its face, was no bar to a recovery by the rightful proprietor. The case came up from the Circuit Court of the United States for the district of Illinois, on a certificate of division. The facts were, that the defendant had been in possession of the land in controversy seven years prior to the commencement of the suit, under a tax deed purporting to have been made in pursuance of the earlier laws of Illinois. The deed recited a sale on December 9, 1823, and by law the sale could not take place until December 15, because the law gave the owner until October 1 to pay his taxes,

¹ Laws 1835, pp. 42-3.

² *Rhinehart v. Schuyler*, 2 Gilm. R. 528; *Bruce v. Schuyler*, 4 Ibid. 278.

³ 11 Howard U. S. R. 414.

and required the auditor to advertise the sale in a newspaper three successive weeks, the last insertion to be sixty days prior to the sale. The tax deed was not, by law, made *prima facie* evidence of a compliance with the prerequisites. A majority of the court held, that the defendant was not entitled to the benefit of the limitation law, upon two grounds: 1. The deed was void upon its face when taken in connection with the law; and, 2. That the deed must, in order to be available, be made by some officer *authorized* to sell the land in controversy, and that the auditor was not so authorized in this instance. The opinion was given by Judge Wayne, who said that, "Upon comparing this section with the former laws of Illinois, we have concluded, that the act of 1835 was not meant to give protection to a person in possession under a deed void upon the face of it. The mode of determining that, is, to test the deed by making a reference to the authority recited in it, for making the sale, in connection with the act giving the auditor power to sell. When the sale is found not to be according to that power, the deed is void upon its face, because the action of the auditor is illegal, and the law presumes it to be known to a purchaser. The latter can acquire no title under it. Being a void deed, possession taken under it cannot be said to be adverse, and under color of title. What was the fact in this case? It is disclosed upon the face of the deed, that the auditor sold the land short of the time prescribed by the act. It was not then a sale according to law. That must have been as well known by the purchaser as it was by the auditor. The law presumes it to have been. The act under which the sale was made, was not meant to prescribe

the authority of the auditor only to make sale, but also to give to purchasers full information of the terms upon which a title could be acquired to land sold for the non-payment of taxes. It was meant to put bidders at a tax sale upon inquiry, whether or not the land was offered for sale according to law. If they do not examine, and shall buy land exposed to sale for taxes, against the law, they do so at their own risk, and it will be presumed against them, that they know that the deeds given under such circumstances are made in violation of official duty and of the law. It cannot be made the foundation of an adverse possession under color of title, against the true owner of the land, whose title to it, the law says, can only be divested in a certain way, for a failure to pay taxes due upon the land. Before the limitation law can operate, the defendant must show a deed from some public officer, *authorized by law*, to sell *such* lands for the non-payment of taxes. Such language does not apply to the *general authority* given by law to an officer to sell land for taxes, but to his authority to sell the *particular land*. The words of the act are, 'authorized to sell *such* land for the non-payment of taxes.' Can it be said, then, that when the auditor, as he did in this case, sells the land for the non-payment of taxes short of the time, that the law authorized him to sell — that he was an officer authorized by law to sell such land for the non-payment of taxes? The legislature must have meant by *title* something more than a void deed upon its face — a title at least, which would be sufficient to induce the possessor of the land to think, and the law to conclude, that there was a foundation for a possession under a right which had been acquired by a purchase — not a mere naked

possession, but one taken in good faith by the purchaser. The legislature intended to extend its protection to persons who had occupied land under a connected title, *prima facie* good against proof *abunde*, which would rebut or destroy such *prima facie* title." Judges Taney, Catron and Grier dissented.¹

¹ In relation to the legal presumption, that every man is bound to know the law, which was relied upon to sustain the majority opinion, Chief Justice Taney says: "It has no real foundation in fact, and has been adopted, because it is necessary, as a general rule, for the purposes of justice. And laws are, therefore, often framed to protect persons, who have acted in good faith in matters of property, from the consequence of their ignorance of law. Thus, laws confirming defective and void deeds for real property, have frequently been passed in some of the States; and their validity has been recognized by this court. Limitation laws, in regard to suits for real estate, are founded on the same principle. For if the title papers of the party in possession are legally executed, and made by persons who had the right to convey, he does not need the protection of an act of limitation. The act before us was evidently and especially intended to protect purchasers from the consequences of their ignorance of the law. And with this object in view, it could make no difference, whether the legal defect was shown by the recital in the deed, or appeared in any other way. The buyer would be as easily and naturally misled, by his want of legal information, in either case. And the law itself, certainly draws no distinction between ignorance of the law in one respect, and ignorance in another. And if every legal defect in the title papers of a purchaser in possession, as they appear on the record, may be used against him after the lapse of seven years, the law itself is a nullity, and protects nobody. To a person not well skilled in all the details of the tax laws of the State, the deed, upon the face of it, appears to be good. It was made by a public officer, authorized to sell for taxes. From his official station and duties, he would be presumed to be familiar with the tax laws, in all their minute details. And he recites what he had done, states the notice given, as if it was the notice required by law; and professes to convey to the purchaser a valid title in due form. Almost every one, not perfectly acquainted with the different tax laws which have been passed, would rely upon it. And I think it is one of those defective conveyances, by a public officer, which the law intended to protect after a possession of seven years."

Judge Catron said: "The land was assumed to be sold, by force of a lien for taxes due; such sale carried the true owner's title throughout, including the patent, regardless of the fact in whose name the land was advertised and sold. So the laws of Illinois expressly provide. The statute has no reference to titles good in themselves, but was intended to protect apparent titles, void in law, and to supply a defense where none existed without its aid. Its object is repose. It operates inflexibly, and on principle, regardless of particular cases of hardship. The condition of society and the protection of ignorance, as to what the law was, required the adoption of this rule. The law should be liberally construed. If the majority opinion is correct, no possible conveyance, made by a public officer, which is void because the requisite forms of law

The construction of this statute came before the Supreme Court of Illinois, in *Irving v. Brownell*.¹ The question arose in an action of ejectment. The declaration was served January 18, 1848. The plaintiff deduced a regular title from the United States. The defendant claimed title under a tax deed, dated January 20, 1829, reciting a sale January 8, 1827. This deed was inadmissible as evidence of title, without proof that the prerequisites of the law under which the sale was made had been complied with. But in connection with it, the defendant proved that he cut timber, dug a well, and took shingles and boards upon the land, to build a house, in the fall of 1840; that he erected his house, and removed upon the land in the spring of 1841, and resided there from thence until the commencement of the suit. The verdict and judgment upon the circuit was for the defendant. That judgment was reversed by the Supreme Court. Trumbull, J. : [after discussing another limitation law, which will be noticed presently,] "There is, however, another act, passed January 17, 1835, under the second section of which (which is to be found in Revised Statutes, chapter 66, sections 8, 9 and 10,) the auditor's deed was admissible in evidence. The act of 1835 does not, like that of 1839, require that the person who would avail himself of its provisions, should have a claim and color of title to the land, made in good faith, but it simply requires that he should have a connected title in law or equity, deducible of record, from this State or the United States, or from any public officer, or other person authorized by the laws of the State to sell such land

have not been complied with, can be maintained. All must equally fall, if not good in themselves, when compared with the law, and the acts required by law to be done before the sale is made."

¹11 Illinois R. 402.

for the non-payment of taxes, etc. The auditor's deed, in this case, is just such a title. On its face it is perfect and complete. No objection can be taken to its form, and if the prerequisites to the sale of the land by the auditor were shown, it would, of itself, constitute a perfect and complete title to the land; and, without proof of these prerequisites, it is a sufficient title to protect any one who can connect himself with it, and show that he has been possessed of the premises by actual residence thereon, under such title, for seven years. If this were not so, the statute would have no meaning; for to require a party, in such a case as this, to show that the prerequisites to the sale for taxes, by the auditor, had been complied with previous to such sale, would be to require him to make out a perfect title, under the tax deed; and in that event, he would have no need to resort to proof of possession to protect him in the enjoyment of the land. His title would be paramount to any other without possession, and the act passed to protect him in his possession, would be perfectly nugatory. The word 'title,' as used in the act of 1835, should not, therefore, be construed to mean a perfect title; nor is the word, in its ordinary acceptance, understood in such a restricted sense. There are perfect titles, and apparent or imperfect titles. Even a naked possession constitutes a species of title, though it may be the lowest degree. The meaning of the word is, therefore, to be ascertained from the connection in which it is used; and there can be no question, when the whole act of 1835 is examined, that the legislature never intended, by the term 'connected title,' a perfect and complete title. The title contemplated can mean nothing more than such a

title as is evidenced by a deed in proper form, and duly executed by one of the officers or persons named in the act, as the source with which the person relying upon it is required to connect himself, by a regular chain of conveyances. It appears from the evidence, however, that the defendant had not been possessed of the premises in question, by actual residence thereon, for seven years, when this action was commenced; he was not, therefore, in a situation to claim the protection of the act of 1835." On the other hand, Judge Drummond, of the United States Court for the District of Illinois, holds that the *authority* of the officer, to sell the land for the non-payment of the tax, must appear, or the court will not give effect to the tax deed under this statute — that a deed which is made by law *prima facie* evidence of title, will not answer, if the testimony establishes the fact that the law under which the sale was made had not been complied with.

There is still another limitation law of Illinois which must be noticed — the act of March 2, 1839 — the provisions of which have already been stated.¹ A construction was given to it in *Irving v. Brownell*.² In addition to the facts heretofore stated,³ it appeared that the defendant had paid the taxes for the years 1839, 1840, '41, '42, '43 and '45, and the purchase of the land for the taxes of 1844, at a tax sale, from which sale the plaintiff redeemed. The court held, 1. That the tax deed offered by the defendant, was not evidence of a claim and color of title made in good faith; 2. That his possession was not sufficient; and, 3. That suffering the land to be sold for the taxes of 1844, and purchasing it himself, was not equivalent to a payment of the tax for that year. Trumbull, J. said:

¹ *Ante*, p. 661.

² 11 Illinois R. 402.

³ *Ante*, p. 675.

"This brings us to a consideration of the first section of the act of March 2, 1839, entitled 'An act to quiet possessions and confirm titles to land;' which is to be found incorporated into the revised statutes, ch. 24, sec. 8. So much of that section as is under consideration, reads as follows: 'That hereafter every person in the actual possession of land or tenements, under claim and color of title made in good faith, and who shall, for seven successive years after the passage of this act, continue in such possession, and shall, also, during said time, pay all taxes legally assessed on such land or tenements, shall be held and adjudged to be the legal owner of said land or tenements, to the extent and according to the purport of his or her paper title.' The object of this statute clearly was to protect those who, supposing that they had a good title to land, should take and continue the actual possession thereof, and pay taxes upon the same, for the space of seven years. Three things are necessary, and must concur, to enable a party to avail himself of this statute: 1. He must have a claim and color of title to the land, made in good faith. 2. He must have and continue in the actual possession thereof, for seven successive years. 3. He must pay all taxes, legally assessed upon said land, during the said seven years. What the claim and color of title must be, that will enable a party to take advantage of this statute, is a question of some difficulty. Under our twenty year limitation act, and under similar statutes in other States and in England, it has been uniformly held, that a person relying upon his possession to defeat a recovery by the party having the legal title, must show that his possession has been adverse; that is, under claim of

title, although the statutes are silent as to the character of possession necessary to bar a recovery in such a case. It would seem, therefore, that the legislature intended to require a different sort of title to protect a party claiming under the seven year law, from what had been required under the limitation act of twenty years, else why require that claim and color of title, made in good faith, should be essential to protect a party claiming under the former act? We are bound to give these words some meaning, and they will have none, if the same construction is to be put upon the act as if they were not in it. It is manifest that the legislature only intended to protect those who had been in possession of land, and paying taxes upon it, under the belief that they had a good title. When would a reasonable man suppose that he had a claim and color of title to land, or what sort of a title would such a man, in good faith, pay out his money for? For none other, we imagine, than what he supposed to be a good title. If he knew that he was not acquiring such a title, or if the circumstances should be such that a reasonable man might know that the title he was obtaining was wholly defective, then it would not be a title acquired in good faith, and, consequently, not entitled to the protection of the act of 1839. By the words, 'claim and color of title, made in good faith,' must, therefore, be understood such a title as, tested by itself, would appear to be good — not a paramount title, capable of resisting all others, but such an one as would authorize the recovery of the land, when unattacked, as if no better title was shown — that is, a *prima facie* title. Such a title, connected with seven years' actual possession and payment of taxes, becomes

invincible. The auditor's deed, offered in evidence in this case, as has already been shown, was not such a title, as, unaccompanied with other proof, it did not afford *prima facie* evidence of title, and it was not, therefore, admissible in evidence, for the purpose of showing claim and color of title, under the act of 1839. But even if the auditor's deed were held to be such a claim and color of title as the statute intended, still it would not avail the defendant, for the reason that the evidence was not shown that he had actual possession of the premises in dispute, for seven successive years previous to the commencement of the action; nor does it show that he paid all taxes assessed upon the land, during said seven years. The action was commenced January 18, 1848, and it appears, from the evidence, that the defendant first took actual possession of the premises in the spring of 1841. It is true, that he cut timber, dug a well, and exercised some acts of ownership upon the land, the fall previous, but those acts did not constitute that actual possession contemplated by the statute. As the legislature, in reducing the time of possession, thought it expedient, as has already been shown, to require stricter proof of apparent title to the land than was requisite under the old limitation of twenty years, so also, and for the same reason, they have thought proper to require that the possession under the act of 1839 should be more open, marked and manifest, than under the former law. It would be unreasonable, when the legislature have used language clearly manifesting a different intention, as to the character of the possession requisite under the two acts, to give the same liberal construction to both. The legislature, undoubtedly, meant

what they have said, that the possession must be actual; that is, visible, open and exclusive, either by an inclosure, the erection of buildings, or in some other way, actually appropriating and using the land, in such an open, visible manner, as to give the real owner notice that the person in possession was occupying and claiming the land as his own. The defendant is equally at fault, in his attempt to show payment of taxes upon the land, as required by the law. The statute requires that the person in possession should pay all taxes legally assessed upon the land, during the seven successive years that he has possession. A payment of taxes for seven years, part before and part after possession taken, does not answer the requirement of the law. In this case it is not pretended that possession was taken before the fall of 1840, and there was no evidence of the payment of taxes, by the defendant, after the year 1845. The taxes of 1844 he did not pay, but suffered the land to go to sale, and then purchased it in; which he insists was a payment of the tax of that year. This is not so. The land was made to pay the taxes, by the sale, not the defendant. He cannot claim that he paid the taxes, while he, also, at the same time, took the chance of getting a tax title upon the land. It is only lands upon which taxes are not paid, that can be sold. In no view of the case did the defendant put himself in a situation to have the benefit of the act of March 2, 1839."

This decision has been substantially followed by Judge Drummond. It has been held in his court, 1. That the tax deed must be *prima facie* evidence of title, in order to avail the possessor under this statute. 2. That a tax sale and certificate, under which the

defendant entered, and continued in possession seven years, did not constitute *claim* and *color*; and that if the tax deed was executed and delivered within the seven years, in pursuance of the sale, it could not have relation back to the sale or entry, so as to protect the possession. 3. That a tax deed, void upon its face, did not give color; and this doctrine he applied, on repeated occasions, to deeds which, upon their face, showed a sale on the wrong day, and to a deed made in pursuance of a sale on the first Monday in March, 1839, for taxes assessed in 1838, the sale being made, as recited in the deed, after the repeal of the law of 1833. 4. That in no case will a tax deed be sustained, as color of title, where the land was listed in the name of the purchaser, or where he was in possession at the time of the assessment and sale.

The decisions in Illinois, upon the construction of the limitation acts of 1835 and 1839, have not given general satisfaction, and it is very evident that the construction is a strained one. Under the statute of January 6, 1827, the possession of the defendant must be under claim and color of title, made in good faith; but it is not necessary for the possessor to have any *written* evidence of it.¹ The statute of January 17, 1835, required possession by *actual residence* under a *connected title, deducible of record, etc.*, while the act of March 2, 1839, required in terms, 1. *Actual* possession for seven years; 2. Under *claim* and *color* of title made in *good faith*; and, 3. Payment of taxes for seven years. The apparent intention of the legislature seems to have been to make the law of 1839 more effectual in protecting the *bona fide* settler, than

¹ *Taylor v. Buckner*, 2 A. K. Mar. R. 18; *McCall v. Nealy*, 3 Watts R. 72.

the previous laws. The court, in *Irving v. Brownell*, have frustrated this intention. Indeed, the law of 1839, according to that decision, is a *dead letter* upon the statute book. "A title which, tested by itself, would appear to be good," would, when accompanied by seven years' actual residence upon the land, be a protection to the settler under the law of 1835. This is conceded in *Irving v. Brownell*, in reference to a tax title which was notoriously bad. For what object, then, was the law of 1839 enacted? It is senseless and unmeaning, if the court have given it the true construction. As we have seen, the law of 1827 required a possession under a claim and color of title — *written* evidence of the claim, and *actual residence* are unnecessary. The law of 1835 requires *actual residence* under a *connected title, deducible of record, etc.*; and by the true rule of construction, there must be a chain of paper title — *prima facie* good, that is, when tested by itself, and not with the paramount title. If the latter test is requisite, the law would be useless. Now, the law of 1839 was really designed to protect a still weaker class of titles than those contemplated by the act of 1835. Instead of "title," it merely required "claim and color of title;" in the place of "actual residence," it requires "actual possession," which may be by inclosure, cultivation, residence, or any of the various acts which, according to the principles of the common law, are evidence of a possession. And besides "claim and color of title," and "actual possession," the law of 1839 requires this additional fact to concur: the payment of "all taxes legally assessed" upon the land, for seven successive years. The legislature seems to have acted on the presumption, that if one entered upon land under claim and color of title, and disseized the true owner,

continued his possession for seven years, made improvements upon the land — without which he could not have actual possession — and paid all taxes assessed against the land during that period, this would afford conclusive evidence of an abandonment by the owner of his paramount title. In the construction of this statute, the courts seem to have been misled by the words “*good faith*.” This means simply that the occupant, in acquiring his title and taking possession, shall not act *mala fide*, by purchasing of one who he knew had no title, or with actual notice of a paramount title in another, or with notice that his own title was defective. He must believe his deed to be valid, and that it conveys to him a good title to the land, although it may turn out that another has a better title. He must enter under a claim of right. His claim must be colorable, that is, give him an apparent right. He must not be guilty of fraud. This is all the law requires.¹ The statute ought to be construed liberally — for it is intended for repose.² The conclusion to be drawn in view of this process of reasoning is, that while the act of 1835 was intended to embrace only connected titles, deducible of record, which are *prima facie* good, accompanied by seven years’ actual residence, the act of 1839 was designed to protect a paper title, which, on its face, purports to carry the fee, whether it is good or bad, *prima facie* or not, so that it was acquired in good faith. The only distinctive differences between the law of 1827 and 1839 being, that the latter reduces the time of limitation from twenty

¹ *McCall v. Nealy*, 3 Watts R. 72; *Moody v. Fleming*, 4 Geo. R. 119; *Den v. Hunt*, 1 Spencer R. 493; *Jackson v. Thomas*, 16 John. R. 301; *Bank v. Smyers*, 2 Strobhart R. 28; Angell on Limitations, 435; Tillingh. Adams, 471.

² *Conyers v. Kenans*, 4 Geo. R. 317; *Fain v. Garthright*, 5 Ibid. 12.

to seven years, and as a compensation, requires paper title, and payment of taxes. Indeed, as has been remarked, "possession under claim and color of title, made in good faith," as used in the act of 1839, is the identical definition of an adverse possession under the law of 1827. Thus much for general limitation laws.

There are, however, special laws enacted with sole reference to the protection of purchasers at tax sales. There is a statute in Arkansas which provides, that "All actions against the purchaser, his heirs or assigns, for the recovery of lands sold by any collector of the revenue for the non-payment of taxes, and for lands sold at judicial sales, shall be brought within five years after the date of such sale, and not after." Another statute of that State, in declaring the legal effect of a tax sale and conveyance, provided, that "The deed so made by the collector shall be acknowledged and recorded as other conveyances of lands, and shall vest in the grantee, his heirs and assigns, a good and valid title, both in law and equity, and shall be received in evidence in all courts in this State, as a good and valid title in such grantee, his heirs and assigns, and shall be evidence of the regularity and legality of the sale of such lands." In *Pillow v. Roberts*,¹ which was an action of ejectment, the defendant set up a tax title under the law last cited, and relied upon it as a paramount title, and as a sufficient title under the statute of limitations above recited, but judgment was rendered against him, and he prosecuted his writ of error, and succeeded in reversing the judgment. On the point as to the statute of limitations, Judge Grier, who delivered the opinion,

¹ 13 Howard U. S. R. 472.

remarks: "In order to entitle the defendant to set up the bar of this statute, after five years' adverse possession, he had only to show, that he and those under whom he claimed, held under a deed from a collector of the revenue of land sold for the non-payment of taxes. He was not bound to know that all of the requisitions of the law had been complied with, in order to make the deed a valid and indefeasible conveyance of the title. If the court should require such proof, before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute, before he could be entitled to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax title."

The Pennsylvania statute provides, that "no action for the recovery of land sold for taxes shall lie, unless the same be brought within five years after the sale thereof for taxes as aforesaid: *Provided always*, that where the owner or owners of such lands sold as aforesaid, shall at the time of such sale, be minor or minors, or insane, and residing within the United States, five years after such disability is removed shall be allowed such person, or persons, their heirs, or legal representatives, to bring their suit or action for recovery of the lands so sold." From what period of time does the limitation begin to run? from the day of sale, or from the time when the purchaser takes possession? In the first case in which this question occurred, it was held that the period of limitation began to run from the time of sale, by the express words of the act; and that for the purpose of enabling the owner to sue and recover in eject-

ment, when no one was in actual possession, the law would presume the purchaser in possession. That, however, was a suit on a note for the purchase-money of a tract of unseated land sold for taxes, and the defendant contended that the plaintiff's title under a commissioner's sale in 1806, was not good, because the five years' limitation had not expired; but the defendant was in possession of the land, and had never offered to give it up to the plaintiff.¹ In a later case, the question was re-considered, and the decision was, that the five years began to run from the time the purchaser took possession, and not from the sale; because, according to the principles which govern actions of ejectment, the owner could not sue until the tax purchaser took possession.² And such continued to be the ruling of the Supreme Court of Pennsylvania,³ until the passage of the statute of March 29, 1824, which authorized the former owner, though in possession of the land, to bring ejectment against the tax purchaser or his grantee, and thus test the legality of the tax sale. Under this statute it is held that the time commences running from the date of the sale.⁴

¹ *Parish v. Stevens*, 3 S. & R. 298.

² *Wain v. Shearman*, 8 S. & R. 357.

³ *Cranmer v. Hall*, 4 W. & S. 36; *Bigler v. Karns*, Ibid. 137; *McCall v. Himebaugh*, Ibid. 164; *Bayard v. Inglis*, 5 Ibid. 465.

⁴ *Robb v. Bowen*, 9 Barr R. 71.

CHAPTER XL.

OF COMPENSATION FOR IMPROVEMENTS MADE BY PERSONS IN
POSSESSION UNDER TAX TITLES.

ACCORDING to the strict rule of the common law, the owner recovers his land in ejectment, without being subjected to the condition or obligation of paying for the improvements which may have been made upon the land by an adverse possessor. The improvements are regarded as annexed to and forming a part of the freehold, and pass by the recovery, to the owner of the latter. Every adverse possessor makes all improvements upon the land at his peril, and upon eviction, is entitled to no remuneration whatever. It is even held that they do not constitute such a consideration as will support an *express promise* by the owner to pay for them.¹ The only instance in which the common law courts grant any relief to the person who made them, is, where, after a recovery in ejectment, the plaintiff brings an action of trespass for the *mesne* profits; in which case, it is said that all improvements of a permanent character, which have increased the value of the land, may be treated as an equitable set-off, and the value thereof

¹ 3 Kent Com. 334; 5 John. R. 272; 1 A. K. Mar. R. 444.

recouped.¹ The rule of the civil law was more equitable in its character. It was, that the *bonæ fidei* possessor was entitled to be reimbursed, by way of indemnity, the expenses of beneficial improvements; so far as they augmented the property in value.² The common law proceeds upon the assumption, that it is the duty of government to assist the rightful owner of property in recovering the possession of it, when he has been unjustly deprived of it; and that he ought not to be clogged with onerous conditions in the prosecution of his remedy; that the improvements may be of such a costly character as to be beyond the ability of the claimant to refund; that he may have a just affection for the property on account of home associations connected with it; that it may have answered all of his necessities and desires in its original state, without the improvements; that the adverse possessor, by the use of reasonable diligence, and cautious inquiry, might have discovered whether the title which he purchased, and upon the faith of which he made his improvements, was clear or clouded; that the maxim *caveat emptor* applies to the possessor, who neglects to examine into the title before purchasing, and is exceedingly conducive to the security of the rights of the real owner; that the possession was taken and improvements made without the consent of the owner; that they originated in wrong, and that consequently there is no moral or legal obligation resting upon the owner to pay for them. As a general rule, this reasoning is entitled to great weight, but a distinction ought to be made between *ignorance*

¹ 2 John. Ca. 441; 1 Ibid. 281; 1 John. Ch. R. 387; 8 Whea. R. 81-2.

² 2 Kent, 336.

and want of *good faith*. The reasoning of Chief Justice Taney, in *Moore v. Brown*, is conclusive upon this point.¹

A case of great hardship, and which appeals most strongly to the sense of justice of every man, may be thus stated: The Supreme Court of Illinois held, that where a deed — commonly called a quit claim — purporting only to convey the present interest of the grantor, was executed and delivered at a time when he had no title, in law or equity, to the land, and he afterwards acquired the legal title, the subsequently acquired title enured to the benefit of his grantee. Upon the faith of that decision, a title is acquired to, possession taken of, and improvements made upon land similarly situated. Afterwards the Supreme Court overrule their former opinion, an innocent purchaser is deprived of his land, and the fruits of his labor. Who will say, under such circumstances, that he is entitled to no compensation for lasting improvements, upon eviction?

Whatever may be the rule of the common law, equity follows, to a great extent, the principle of the civil law. Thus where one, believing that he has title to a parcel of land, enters and erects a building upon it, and the owner stands by and permits him to go on with his improvements, without giving him any notice of the adverse title, equity will decree to the occupant, compensation.² So where the true owner of an estate, after a recovery thereof at law, from a *bona fide* purchaser, without notice, and for a valuable consideration, seeks an account in equity, against such possessor, for the rents and profits, the

¹ *Ante*, pp. 675-6.

² 6 John. C. R. 68-9; 1 Scho. & Lef. R. 73; 1 Story's Eq., Sec. 388; *Bradley v. Snyder*, 14 Ill. R. 263.

defendant is allowed to deduct therefrom the full amount of improvements made to the benefit of the estate by him, and thus to recoup them from the rents and profits.¹ And where the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of chancery to enforce it, this aid will only be given on the terms of making compensation for the beneficial improvements made by the defendant.² And it is very strongly intimated by Judge Story, that the courts will go one step further and sustain a bill brought by the possessor to recover against the owner, after a suit at law, the plaintiff's expenditures for improvements.³ Upon a review of all the cases which have been decided in this country, in whatever form they may have been presented to the court, it may be safely affirmed that equity will grant relief to the *bona fide* possessor who has made lasting and valuable improvements upon the land.⁴ The right of a *bona fide* possessor to sustain a bill for compensation, after an eviction at law, is denied in *Winthrop v. Huntington*.⁵ Where the occupier has been guilty of fraud, or had notice of the defect in his own title, or of a superior outstanding title, he is not entitled to compensation.⁶ Such is

¹ *Bright v. Boyd*, 1 Story R. 478.

² *Ibid.*

³ *Ibid.*

⁴ *Parkhurst v. Van Cortlandt*, 1 J. C. R. 274; *Botsford v. Burr*, 2 *Ibid.* 405; *Benedict v. Gilman*, 4 Paige C. R. 58; *Stuke's case*, 1 Bland's R. 57; *Southall v. McKeand*, 1 Wash. Va. R. 336; *Dellet v. Whitner*, 1 Chev. R. 213; part 2; *Gillis v. Martin*, 2 Dev. Ch. R. 470; *Withers v. Yeadon*, 1 Rich. Ch. R. 324; *Kennedy v. Kennedy*, 2 Ala. R. 571; *Goodwin v. Lyon*, 4 Porter Ala. R. 297; *Herring v. Pollard*, 4 Humph. R. 362; *Pulliam v. Robinson*, 1 Mon. R. 228; *Stevenson v. Dunlap*, 7 *Ibid.* 134; *Ballard v. Stephenson*, *Ibid.* 364; *Hamilton v. Hamilton*, 5 Litt. R. 28; *McC Campbell v. McC Campbell*, *Ibid.* 92; *Richardson v. McKinson*, 6 Litt. R. 320; *Thompson v. Mason*, 4 Bibb R. 195; *Hewett v. Berryman*, 5 Dana R. 162; *Taylor v. Whiting*, 9 *Ibid.* 399; *Barlow v. Bell*, 1 A. K. Mar. R. 246; *Griffith v. Depew*, 3 *Ibid.* 177; *Bell v. Barnett*, 2 J. J. Mar. R. 516; *Hawkins v. Lowry*, 6 *Ibid.* 55.

⁵ 3 Ohio R. 327.

⁶ *Van Horne v. Fonda*, 5 J. C. R. 388; *Putnam v. Ritchie*, 6 Paige C. R. 390;

believed to be the equity rule in regard to compensation for improvements made by a possessor who has acted in good faith.¹

For the purpose of remedying the injustice of the common law rule, and assimilating as nearly as possible to the more just and equitable principles of the civil law in this respect, many of the States have from time to time enacted laws for the protection of the *bona fide* occupant, and securing to him full compensation for any losses which he might otherwise sustain by reason of an eviction under a paramount title. These laws are variously denominated, "betterment," "improvement," and "occupying claimant" laws. They are undoubtedly constitutional, standing upon equitable principles and public policy for their support.² They are sustainable upon the same principle that statutes of limitation and acts curing or confirming void and defective titles, are held valid, where they do not affect vested rights. The owner is bound to take notice of the general law, which prescribes the time within which he must make his entry upon, or bring his action for, land in the adverse possession of another; so he is bound to take notice of those general laws which promulgate the rule, that if he lies by and suffers another to enter upon his land and make improvements, without giving the adverse possessor notice of the claim, he shall be estopped from denying the duty of compensation.

McKim v. Moody, 1 Rand. R. 58; *Morris v. Terrell*, 2 Ibid. 6; *Pomeroy v. Lambeth*, 1 Iredell C. R. 65; *De Brahm v. Fenwick*, 1 Desan. R. 114; *Belton v. Briggs*, 4 Ibid. 465; *Dellet v. Whitner*, 1 Chev. R. 213, part 2; *Harrison v. Fleming*, 7 Mon. R. 537; *Harrison v. Baker*, 5 Litt. R. 250; *Scroggs v. Taylor*, 1 A. K. Mar. R. 247; *Patrick v. Marshall*, 2 Bibb R. 40.

¹ *Ross v. Irving*, 14 Ill. R. 176-8.

² *Ross v. Irving*, 14 Illinois R. 171, and cases there cited. The only cases which maintain the opposing doctrine are *Nelson v. Allen*, 1 Yerger R. 360, and *Green v. Biddle*, 5 U. S. Cond. R. 370.

Such laws are prospective in their character, and are no more unjust to the owner, than the common law rule was to the possessor.

Whether these laws are applicable to improvements made under tax titles, and what kind of a tax title will constitute a proper basis for a claim of compensation, will depend upon the peculiar phraseology of each particular statute. The only case reported where a claim for improvements was set up by one in possession under a tax title, after eviction, is that of *Ross v. Irving*.¹ The statute of Illinois exempted the adverse possessor of land held under "a plain, clear and connected title in law or equity, deducible of record, without any *actual* notice of a paramount title," etc., from an action for the *mesne* profits, and gave him compensation for lasting and valuable improvements made prior to the receipt of such notice. In the case cited, where the defendant was in possession, and made improvements under a tax deed which was not evidence *per se* of title, and who failed to prove a compliance by the officer, with the requirements of law, in the making of the sale and conveyance, and where the Supreme Court had held that his deed was not even "a claim and color of title" under the limitation law of 1839, it was held that he was entitled to the benefit of this law. It would therefore seem to be the settled rule in Illinois, that every possessor under a tax title, of whatever grade, is protected in his improvements, and exempted from a suit for the back rents and profits.

The Pennsylvania statute of April 3, 1804, declared: "that no action for the recovery of land sold for taxes shall lie, unless the same be brought within

¹ 14 Illinois R. 171.

five years after the sale thereof for taxes, as aforesaid, *Provided, always*, that where the owner or owners of such lands sold as aforesaid, shall, at the time of such sale, be minor or minors, or insane, and residing within the United States, five years after such disability is removed shall be allowed such person, or persons, their heirs or legal representatives, to bring their suit or action for recovery of the lands so sold; *but* where the recovery is effected in such case, the value of the improvements made on the land so sold, after the sale thereof, shall be ascertained by the jury trying the action for recovery, and paid by the person or persons recovering the same, before he, she or they shall obtain possession of the land so recovered.”¹ In the construction of this statute it has been held, that the purchaser is entitled to compensation for improvements, whether the lands, at the time of the sale, belonged to persons laboring under disabilities, or those who were legally competent to protect their own interests, by the payment of the tax or a redemption from the sale.² Where the land is *seated* at the time of the sale, the purchaser is bound to take notice of it, and if he neglects to make the necessary inquiries, he must be treated as a *mala fide* purchaser, and cannot recover compensation for his improvements. If he knew that the land was seated, he purchases in fraud of the law, and it is clear that he cannot recover. The sale of seated land is absolutely void, and passes neither title or color of title. But the courts go one step further, and hold that the grantee of the purchaser, at the sale, without notice of the illegality in the sale, is not entitled to compen-

¹ 1 S. & R. 38; 4 Smith Laws 202, Sec. 3.

² *Creigh v. Wilson*, 1 S. & R. 38.

sation.¹ It was, however, held that, although the sale of land *exempt* from taxation was absolutely void, yet the purchaser was entitled to the value of his improvements under this statute.² In another case, it was held that the purchaser was entitled to recover the value of his improvements, where the taxes for which the land was sold had been paid before the sale.³ This latter case lays down the broad principle that, under this statute, compensation is incident to every recovery for irregularity in the assessment, process or sale; in fine, that it was designed for the protection of every *bona fide* purchaser at a tax sale, who has expended money or labor on the faith of the title he acquired.⁴ And it seems to be conceded, that in all cases where the purchaser knew of the illegality of the sale, he is entitled to no compensation whatever. But it is difficult to reconcile these cases upon principle. Whether the land is seated, exempted from taxation, or the taxes had in fact been paid at the time of the sale, the officer had no authority to sell, and all of these cases should stand upon the same footing in construing the statute. The only conceivable difference is, that where land is seated, the purchaser is bound, at his peril, to take notice of the fact. This is undoubtedly the rule in reference to a purchase made by one individual from another, where a third person is in possession under the vendor, or even adversely; but no rule is remembered which devolves upon a bidder at a tax sale, before any right has become vested in him, and when the State is offering

¹ *McKee v. Lamberton*, 2 W. & S. 107; *Hockenbury v. Snyder*, Ibid. 240; *Miller v. Keene*, 5 Watts R. 350; *Cranmer v. Hall*, 4 W. & S. 36; *Lambertson v. Hogan*, 2 Barr R. 22.

² *Coney v. Owen*, 6 Watts R. 435. In this case Judge Kennedy dissented.

³ *Gilmore v. Thompson*, 3 Watts R. 106.

⁴ See, also, *Coney v. Owen*, 6 Watts R. 436.

lands for sale, in hostility to the title of the true owner, to make inquiry. The fair construction of the statute would be, to compensate all purchasers at tax sales, for money and labor expended in improving the land purchased, *unless the illegality of their titles appears upon the face of the proceedings under which they claim.*

CHAPTER XLI.

OF THE INTERPRETATION AND CONSTRUCTION OF STATUTES
AFFECTING REAL PROPERTY.

RIGHTS of property depend for their existence upon natural law. But the evidence of those rights, and the remedies to enforce and protect them, are the inventions of civil society. Lord Camden remarks, that "the great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away, or abridged by some public law, for the good of the whole. The cases where this right of property is set aside, by positive law, are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man, by common consent, gives up that right for the sake of justice and the general good."¹ The American constitutions, as we have seen, furnish many safeguards for the protection of property from legislative spoliation and private invasion. The government can take it but in one of two ways, viz.: for a public tax, levied upon principles of just equality, and for public use, upon making just compensation to the owners. And it is universally conceded to be

¹ *Entick v. Carrington*, 19 Howard St. Tr. 1066.

the duty of the government to furnish adequate remedies to the owner, not only to recover the possession of it when wrongfully or unjustly withheld from him; but, also, to protect him in the possession and use of it, by the punishment of the wrong doer. This remedial power of the government imposes upon it the duty of furnishing to creditors ample means to enforce the collection of just debts, by subjecting the estate of the debtor to their payment. The only additional power over private property, which may be exercised by strangers, is that implied in the common law maxim, "SALUS POPULI EST SUPREMA LEX." There is an implied assent on the part of every member of society, that his own individual welfare shall, in case of necessity, yield to that of the community; and that his property shall, under certain circumstances, be placed in jeopardy, or even sacrificed, for the public good. The instances given of this class of powers are, the pulling down of private houses, or the raising of bulwarks, upon private property, for the necessary defense of the State against a public enemy, and the demolition of a house, in a populous place, for the purpose of arresting the progress of a fire, and preventing a general conflagration. Upon the same principle, a private mischief must be endured, rather than a public inconvenience; thus, if a public highway be out of repair, and impassable, a passenger may lawfully go over the adjoining land. In every instance above given, an interference with private property is obviously dictated and justified *summa necessitate* — by *State* OR *private* NECESSITY — by a due regard to the *public good and safety*, or by the *immediate urgency* of the occasion. The sale of land to pay debts is an exception, that being founded upon

principles of *natural justice* alone. It follows as a necessary consequence, that all statutes which are made with the view of interfering with, or divesting rights of property, should be construed *strictly* — especially where they are penal in their character or effects.¹

The various rules of interpretation and construction which have a *direct* bearing upon this class of statutes, have been *incidentally* cited and discussed in the preceding portions of this work, especially those which govern statutes conferring *powers* to be exercised over real property. It is now proposed — contrary to the original plan of the work — to conclude this chapter with a concise statement of those rules which are generally applied in the interpretation and construction of statutes of every class, inasmuch as they *indirectly* aid in arriving at a proper conclusion in the exposition of statutes affecting real estate.

“There is a primeval principle in man which ever urges him, with irresistible power, to represent outwardly that which moves him within; a pressing urgency of utterance.”² Whatever may be our thoughts, emotions, will, desires, or commands, the object we have in view can alone be accomplished by resorting to *outward* manifestations. There is no *direct* communion between the minds of men. *Signs* are the only mediums of communication. “The signs which man uses — the using of which implies intention — for the purpose of conveying ideas or notions to his fellow creatures, are very various; for instance, gestures, signals, telegraphs, monuments, sculptures of

¹ Smith's Com. 854; *Sharp v. Spier*, 4 Hill R. 76; *Smith v. Spooner*, 3 Pick. R. 229; *Wales v. Stetson*, 2 Mass. R. 146; 9 Gill & J. 479; Broom's Legal Maxims, 3-6 and 465; *Ante*, chapters 1 and 2.

² Lieber's Legal and Political Hermeneutics, chap. 1, sec. 2.

all kinds, pictorial and hieroglyphic signs, the stamp on coins and seals, beacons, buoys, insignia, ejaculations, articulate sounds, or their representatives—that is, phonetic characters, on stones, wood, leaves, paper, etc.—entire periods or single words, names in a particular place, and whatever other signs—even the flowers, in the flower language of the East—might be enumerated.”¹ A tear, a blush, or a contortion of the countenance, may convey the emotion or thought of a human being, as clearly as an articulate sound, or a written statement. These signs are, therefore, used to convey ideas; and *interpretation*, in its widest sense, is the discovery and representation of the true meaning of them. The true meaning of any sign, is that which the person who used it is desirous of expressing. In legal literature, we seldom deal with any other signs than *words*, written or spoken. All laws were originally written, or have been reduced to writing by judges and commentators. Statute laws, of course, are invariably in writing or print. The signs used by the legislature, are *words*. With the interpretation of such signs as are used by the law-making body, we purpose to deal. There is a manifest distinction between interpretation and construction, though they are frequently confounded, and used as synonymous terms. *Interpretation* is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey, and of enabling others to derive from them the *same idea* which the author intended to communicate. *Construction*, on the other hand, is the drawing of conclusions, respecting subjects that lie beyond the direct expression of the text—conclusions which

¹ Lieber, chap. 1, sec. 3.

are in the spirit, though not within the letter of the text. Construction must, therefore, be bridled by the true principles of interpretation, else it becomes a dangerous weapon in the hands of a judge, giving to him a species of *legislative discretion*. The legislature may use words which every one understands, and which, for the case put in the text, are sufficiently clear; but if you were to ask each individual composing that body, as to the exact limits to which he wishes to see the rule extended, or put to him a number of cases in progressive connection with each other, he himself would be doubtful, in most instances, how far he would extend the application of the rule. The consequence is, that interpretation may be according to the more or less comprehensive sense in which the words are used. There are but few words which have not a contracted and extended sense; it is this which creates the necessity of interpretation. The human mind is incapable of anticipating, in an order or law, every possible combination of facts which may arise, and fix a definite rule by which every case may be governed: this gives rise to the doctrine of construction. Interpretation gives effect to the intention of the legislature, as manifested by a sound exposition of the *words* of the text; while construction resorts to analogies, and treating the text as simply putting cases by way of example, holds, that all cases which stand upon the same footing, of reason and justice, as those enumerated, were designed to be embraced by the law giver. The one carries into effect the *open*, and the other the *secret*, intent of the law. But courts sometimes, in the exercise of that discretionary power which the doctrine of construction gives rise to, make some

remarkable decisions. Indeed, the tendency of the doctrine is to drive the judges to extremes, neither of which is permissible on general principles.

A statute may be defined to be the written will of the legislative body of a State, solemnly expressed, according to the forms prescribed in the constitution — an act of the legislature. The word is used in contradistinction to the common law. Statutes are divided into classes, each distinguished by a technical name. They are *general* or *special*, *public* or *private*. A *general* or *public* act is a universal rule, that regards the whole community ; of which the courts are bound to take notice judicially and *ex officio*, without the statute being particularly pleaded or formally set forth by the party who claims an advantage under it. Occasionally a *private* statute is in terms declared to be a *public* statute. The only effect of this declaration is to compel the courts to take judicial notice of it. *Special* or *private* acts are rather *exceptions* than *rules*, being only those which operate upon particular persons and private concerns. Of these, the courts are not bound to take notice, unless they be formally shown and pleaded. Statutes are also either *declaratory* of the common law, or *remedial* of some defects therein. A *declaratory* statute is one passed for the purpose of putting an end to a doubt as to what the common law was at the time of its enactment, and which in effect declares what that law then was, and had ever been. So a statute, which declares the meaning of a prior statute, upon the construction of which doubts had arisen, is called a declaratory act. *Remedial* statutes are those which are made to supply the defects, or abridge the superfluities which experience may prove to exist in the common law.

This class is subdivided into *enlarging* statutes, by which the common law is rendered more comprehensive and extended than it was before; and into *restraining* statutes, whereby the common law is narrowed down to that which is regarded by the legislature as just and proper. The term remedial is also applied to statutes which confer upon parties a new right and a new remedy to enforce it, or which simply recognize a common law right, and give to the injured party a cumulative remedy.¹ Another division of statutes is into *temporary* and *perpetual*. A temporary statute is one which is limited in its duration at the time of its enactment; whereas a perpetual statute is one which is not limited by express words, and consequently continues in full force and effect until repealed by the legislature. Still another division, is into *affirmative* and *negative*. An affirmative statute is one which is affirmative in its terms; such a statute does not abrogate or repeal the common law. To illustrate: a statute authorizing the acknowledgment of deeds, and declaring the certificate of the officer evidence of the due and legal execution of the deed, is an affirmative statute, and does not take away the common law mode of proving the execution of the deed by the subscribing witnesses, or in any other mode known to the common law. A *negative* statute, on the other hand, is expressed in negative terms, and so controls the common law, that it has no force in opposition to the statute. Examples of this class of statutes may be thus given: The recording laws declare a deed *void* as to subsequent purchasers, unless it is recorded in the time prescribed by the statute: the statute of frauds declares that no action shall be

¹ 1 Bl. Com. 85-7.

brought whereby the defendant shall be charged with the debt of another, unless the promise is in writing and signed by the defendant; and the stamp acts provide that no written instrument shall be received in evidence, unless regularly stamped, etc. In all of these instances, the statutes supersede the common law — repeal it by implication, because both cannot be enforced. And lastly, some statutes are called *penal*. By this term is not only included those statutes which inflict a penalty, or *EX VI TERMINI*, work a forfeiture, but it extends to all statutes which give a summary remedy; those made in favor of corporations or individuals in derogation of common right; those made in derogation of the common law; those which affect property; those which are technically called disabling acts; and statutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon the citizen — indeed, it embraces all laws which in any manner affect the liberty or property of the citizen, in violation of the established maxims of the common law. The civil law division of statutes recognized but three classes, *real*, *personal* and *mixed*. Real statutes related to property in terms; personal, to persons alone, and only treated of property incidentally; mixed, were those which equally concerned persons and property.

The common law rules by which courts expound statutes, being founded upon the reasoning of the ethical writers, and borrowed from the civilians, it is proper to review in a concise manner, the principles by which the writers upon the natural and civil law were governed in construing and interpreting a given text. Lieber, in his work on “Legal and Political Hermeneutics,” thus defines the different species of inter-

pretation : 1. *Close* — where for just reasons connected with the formation and character of the text, we are induced to take the words in their *narrowest* meaning. 2. *Extensive* — that which induces us towards the adoption of the more or most comprehensive signification of the words. 3. *Extravagant* — that mode of interpretation which substitutes such meaning as is evidently beyond the true meaning, and hence not genuine. 4. *Free or unrestricted* — that which proceeds simply on the general principles of interpretation in *good faith*, without being tied down by any specific or superior principle. 5. *Limited or restricted* — this takes place when other rules and principles than those which are strictly speaking hermeneutic, limit and control us. 6. *Predestinated* — is that where the person who interprets, either consciously or unknown to himself, yet laboring under a strong bias of mind, makes the text subservient to his preconceived views or some object he desires to arrive at. This seems to be frequently adopted as the rule of action by judges and lawyers. It seems to be an artful rule, devised by the cunning, to prove that a text means something which never entered into the mind of the author of it. And, 7. *Authentic* — or that which proceeds from the author himself. Professor Lieber also divides *construction* into close, comprehensive, and transcendent or extravagant, and thus defines them : 1. *Close* — that which inclines to the directest possible application of the text, or the principles it involves; to new or unprovided cases, or to contradictory parts — in short, to subjects which lie beyond the words of the text. 2. *Comprehensive* — or that which inclines to an extensive application of the text, or the principles which it involves; to new,

unprovided, or not sufficiently specified cases or contradictions. 3. *Transcendent* — or that which is derived from, or founded upon, a principle superior to the text; and, nevertheless, aims at deciding on subjects belonging to the province of that text. 4. *Extravagant* — is that which carries the effect of the text beyond its true limits, and is, therefore, no longer genuine construction — as the previous species becomes of a more and more doubtful character, the more it approaches to this. The difference between transcendent and extravagant construction is this: the former remains, in spite of its transcendency, within the spirit of the law, or document to be construed; while extravagant construction abandons it. That the attempt, by malconstruction, to carry designs into the sphere of an instrument, amounts to the same with carrying the effect beyond its limits, is clear. Having ascertained the different species of interpretation and construction, Lieber proceeds to note the following principles of interpretation to be applied to every kind of text. 1. We must convince ourselves of the *genuineness* of the text to be interpreted. 2. No sentence, or form of words, can have more than one *true sense*, and it is this we must inquire for. This is the basis of all interpretation. Interpretation without it has no meaning. Every man or body of persons making use of words, does so in order to convey a certain meaning; and to find this precise meaning is the object of all interpretation. To have two meanings in view is equivalent to having no meaning — and amounts to absurdity. 3. In no case of human life, in which we are called upon to act — to apply rules or to understand what others say — can we dispense with common sense and

good faith ; but they are peculiarly requisite in interpretation, because its object is to discover something that is doubtful, obscure, veiled ; which therefore may admit of different explanations. If without common sense, we make even of strict syllogism, an instrument, apparently, to prove absurdities, how much more are those two ingredients of all honesty necessary in interpretation. Common sense and good faith are the leading stars of all genuine interpretation. Good faith and interpretation means that we conscientiously desire to arrive at truth, that we honestly use all means to do so, and that we strictly adhere to it, when known to us ; it means the shunning of subterfuges, quibbles and political shuffling ; it means that we take the words fairly as they were meant.

4. We have to take words in their most *probable* sense, not in their original, etymological or classical, if the text be such that we cannot fairly suppose the author used the words with skill, knowledge and accurate care and selection. 5. We must try to ascertain the meaning of doubtful words from other passages of the same text ; or, 6. Ascertain it from other sources which we consider fully competent. The doctrine of cotemporaneous interpretation is founded upon this principle. 7. If technical terms belonging distinctly to the terminology of an act or science, are used as such, the same good faith demands that they must be taken in their technical, and not in their common sense. 8. Tropes are to be taken as tropes, and direct expressions as direct. 9. The special, particular and inferior cannot militate with the general and superior. 10. We must endeavor to arrive at the sense in which words are used, as much as possible *from the words themselves*, and bring to our assistance

extraneous principles, rules, or other aid, in that measure and degree only, as the strictest interpretation becomes difficult or impossible. 11. That which is probable is preferable to the improbable; the fair to the unfair; the customary to the unusual; the easy to the difficult; the intelligible to the unintelligible. 12. We are to follow the special rules of interpretation which have been prescribed by proper authority. 13. We must endeavor to find assistance in that which is near, before we resort to that which is less so. Thus, we must first try to ascertain the meaning of the text from the words used; if we do not understand the words, we try whether its connection in a sentence will shed light upon it; if we do not succeed, we endeavor to derive assistance from the period; if this be unavailing, we examine the whole instrument or work; if that leads us to no satisfactory result, we examine other writings, etc., of the same author; and if that does not suffice, we resort to cotemporaneous writers, or declarations, or laws similar to that which forms our text.

The rules of construction laid down by Lieber are, 1. That the principles of interpretation, when applicable at all, constitute valid rules of construction. 2. That the main guide of construction is analogy, or rather reasoning by parallelism. 3. That the aim and object of the text are essential, if distinctly known, in construing them. 4. So, also, are the causes of a law. 5. That no text imposing obligations is understood to demand impossible things. 6. That privileges, or favors, are to be construed so as to be least injurious to the non-privileged or unfavored. 7. That the more the text partakes of the nature of a compact, or solemn agreement, the closer ought to be its

construction. 8. That a text imposing a performance, expresses the minimum, if the performance is a sacrifice to the performer; the maximum, if it involves a sacrifice or sufferance on the side of the other party. 9. That the construction ought to harmonize with the substance and spirit of the text. 10. That the effects which would result from the one or the other construction, may guide us in deciding which construction we ought to adopt. 11. That the older a law, or any text containing regulations of our actions, though given long ago, the more extensive the construction must be in certain cases. 12. That nothing contributes more to the substantial protection of individual liberty, than a habitually close interpretation and construction. 13. It is important to ascertain whether the words were used in a definite, absolute and circumscribed meaning, or in a generic, relative, or expansive character. 14. Let the weak have the benefit of a doubt, without defeating the general object of the law; let mercy prevail, if there be real doubt. 15. A consideration of the entire text or discourse is necessary, in order to construe fairly and faithfully. 16. Above all, be faithful in all construction. It is not the object of construction to force extraneous matter into a text. The same principles constitute the basis of interpretation and construction in the civil code.¹ The best classification of the several species of construction and interpretation is that of Rutherford — he divides them into literal, rational and mixed. 1. *Literal* — where we collect the intention from the words only, as they lie before us. 2. *Rational* — where the words do not express that intention perfectly, but exceed, or fall

¹ Smith's Com., chap. 12; Vattel's Law of Nations, chap. 17.

short of it, and we are to collect it from rational or probable conjecture only. 3. *Mixed*—where the words, though they do express the intention when they are rightfully understood, are of themselves of doubtful meaning, and we are bound to have resort to like conjecture, to find out in what sense they are used. The principles applicable to each class of expositions are similar to those laid down by Lieber.

The common law, though it resorts to the same principles, for the purpose of ascertaining the true intent of the law giver, is more simple in its classification of the species. There are but two modes of interpreting and construing statutes known to that law—liberally and strictly. To expound a statute *strictly*, is to adhere precisely to the words or letter of the law, which includes, of course, fewer particulars than a freer construction. To interpret it liberally, largely or comprehensively, is to carry the meaning of the law giver into more complete effect than a strict or confined exposition would allow. This latter mode is analogous to the *rational* rule of the civil law, and ethical writers.

Such being the general principles by which treaties, laws and contracts are expounded, the reader is prepared for the *particular* rules and maxims which the courts of England and this country lay down in construing statutes of different kinds; and they are inserted here for the convenience of the profession. The author is aware that there are many other rules of construction not to be found in the following digest, but he is confident that in no other book can as many be found, and so conveniently arranged for the use of the practitioner.

MAXIMS AND RULES OF INTERPRETATION AND CONSTRUCTION.

1. Courts have nothing to do with the propriety or expediency of a statute. 3 Scam. R. 153; 8 John. R. 51.

2. The rules and maxims of interpretation and construction, laid down by the sages of the common law, must be adhered to. 3 Scam. R. 157; 7 Cranch R. 52; 2 U. S. Cond. R. 412; 1 Kent's Com. 462; 10 John. R. 479.

3. The common law enters largely into the construction of every statute, and a just interpretation is ever controlled by that law. 10 John. R. 586.

4. It is said to be the best construction of a statute, to expound it as near to the rule and reason of the common law as possible, and by the *course* which that law observes in similar cases. Dwarris, 695; 1 P. Wms. 252; 1 Saund. R. 240; 10 John. R. 579; Doug. R. 27; 1 Burr. R. 445; 1 Kent's Com. 464; 6 Bac. Abr. 383; Co. Litt. 272, *b.*; Plowden's Com. 365; 3 Co. R. 7; 4 Co. R. 4.

5. When a power is given by statute, but the means of executing it are not prescribed, the power must be executed according to the course of the common law; and where the provisions of the statute are general, it is subject to the control and order of the common law — in other words, the statute is to receive such a construction as may be agreeable to the rules of the common law, in cases of that nature. 6 Bac. Abr. Title Statute, 383-4.

6. When a word is used in a statute, which has a well-known and definite meaning at common law, it is presumed that the legislature intended to use it in that sense. 6 Bac. Abr. 383; 6 Mod. R. 143; 1 N.

H. R. 555-6; 4 Gilm. R. 205-6; 8 Iredell, 147; Dwarris, 696.

7. When a statute makes an innovation upon the established principles of the common law, it must be strictly construed. 16 John. R. 7; 2 Gilm. R. 184 and 429; 4 Binney R. 116; 5 Denio R. 119; 1 Barb. S. C. R. 65; 3 Kelly R. 31; 4 Gilm. R. 20; 4 Mass. R. 471; 15 Ibid. 205; 9 Pick. R. 496; 13 Ibid. 284; 3 Stew. & Port. R. 13; 2 Humph. R. 320.

8. The power to construe statutes is vested in the courts alone. 1 Bl. Com. 87, note 26; 7 John. R. 494; Ibid. 508-9.

9. The legislature have no right to usurp this judicial prerogative, by means of declaratory and explanatory laws, especially where they injuriously affect vested rights. 7 John. R. 508-9.

10. The rules for the construction of statutes are the same, at law and in equity. Peters' C. C. R. 188.

11. There is no difference in the rules of construction, applicable to public and private statutes. 9 Porter R. 266.

12. The validity of a rule of construction is not to be tested by extreme cases. 8 John. R. 420-1; 12 Ibid. 483.

13. The *intention* of the legislature must always control in the construction of a statute. 2 Cranch R. 10; Ibid. 358; 5 T. R. 449; 3 Cowen R. 89; 3 Scam. R. 153; Bre. R. 243; Ibid. 249; 12 John. R. 176; 15 Ibid. 358; 4 Cushing R. 314; 1 Mis. R. 147; 2 H. & J. 69; Ibid. 167; 2 Pet. R. 662; 1 Ibid. 64; 21 Wend. R. 211; 1 Green R. 240.

14. All statutes, whether penal or remedial, are to be construed according to the apparent intent of the legislature, to be gathered from the entire language

used, in connection with the subject-matter and purpose of the law. 19 Conn. R. 292.

15. The court must judge of the intent of the legislature, from the language they have used to express that intent, and where the language is clear and explicit, and susceptible of but one meaning, and there is nothing incongruous in the act, the court is bound to suppose the legislature intended what their language imports. Walker Ch. R. 394.

16. Although it is a fundamental rule, that every law must be construed according to the intention of the makers, that intention is never resorted to for any other purpose than to ascertain what they, in fact intended to do, and not for the purpose of ascertaining what they have done. 3 Barb. S. C. R. 9.

17. Where a law is plain and unambiguous, whether expressed in general or more limited terms, there is no room left for construction, and a resort to extrinsic circumstances is not permitted for the purpose of ascertaining the meaning. 9 Porter R. 266.

18. In such cases, the legislative will must be *obeyed* by the courts. 2 Cranch R. 358; 2 Gilm. R. 1; 3 A. K. Mar. R. 489; 2 Pet. R. 662; 1 Pick. R. 45; Ibid. 250.

19. Courts may give a sensible and reasonable interpretation to legislative expressions which are obscure, but they have no right to distort those which are clear and intelligible. 13 Mass R. 324.

20. The ordinary rule is, that the intention can only be determined by the fair and natural import of the terms used, and in view of the subject-matter of the law. 19 Vermont R. 131; 3 Kelly R. 146; 21 Vermont R. 152; 3 Missouri R. 496; 25 Maine R. 493.

21. Without reference to any traditional history of the occasion of the enactment of the statute, unless that result from some known state of embarrassment under the former law. 19 Vermont R. 131.

22. Where the language is so obscure as to cloud the intention, or when it is couched in ambiguous terms, so that the real meaning is doubtful, then every extrinsic fact and circumstance may be resorted to for the purpose of ascertaining the unexpressed intention of the legislature. 2 Cranch R. 358; 7 Ibid. 52.

23. Thus, you may resort to the title of the statute. 3 Whea. R. 610; 2 Cranch R. 358; 1 Kent, 469; 14 John. R. 206; 2 Bailey R. 334; 1 Ham. R. 469; 3 Hawkes R. 403; 9 Porter R. 266; 1 Kelly R. 157.

24. To the preamble. 4 T. R. 793; 2 Cowper R. 543; 3 Scam. R. 465; 15 John. R. 89; Ibid. 390; Co. Litt. 79 a; 3 McCord R. 298; 1 Pick R. 248; 1 Harrington R. 285; 1 Kelly R. 157; 1 Kent 461.

25. To usage under it. 1 T. R. 728; 1 Scam. R. 71; 3 Scam. R. 100; Ibid. 470; 1 Lou. Ann. R. 419; 5 Cra. R. 22; Harper R. 101; 5 Iredell Eq. R. 71.

26. To a comparison with other laws. 1 Bl. Com. 60; 9 Cowen R. 506.

27. To cotemporaneous construction. 3 Scam. R. 97; Ibid. 465; Bre. R. 213; 1 Gilm. R. 517; 2 Ibid. 1; 1 Kent, 464; 16 Ohio R. 599.

28. To arguments founded upon the hardship of the law. 9 Cranch R. 203.

29. To the history and situation of the country at the time the law was enacted. 1 Whea. R. 115; 3 Scam. R. 160; Ibid. 609; 17 Vermont R. 479.

30. To the reason and spirit of the law. 6 Cranch R. 307; 3 Scam. R. 153; 15 John. R. 358; 3 A. K. Mar. R. 489; 4 Comst. R. 140.

31. To the inconveniences which will result from a particular construction. 2 Cranch R. 358; Bre. app. 22; 3 Scam. R. 153; Co. Litt. 66 *a*, and Butler and Hargrave's note 6; 3 Mass. R. 215; Ibid. 523; 7 Ibid. 306; 11 Pick. R. 487; 2 Mass. R. 475.

32. To the absurd consequences which will follow it. 2 Cranch R. 358; Bre. app. 22; 3 Scam. R. 153.

33. It is always presumed that the legislature intend the most reasonable and beneficial construction of their acts, where the design of them is not apparent. 4 Mass. R. 534; 12 Ibid. 383.

34. If it is apparent that, by a particular construction of a statute in a doubtful case, great public interests will be endangered or sacrificed, it ought not to be presumed that such a construction was intended by the legislature. 3 Scam. R. 153.

35. The intention must be collected from the *whole act*. 2 Cranch R. 358; 2 Scam. R. 224; 3 Ibid. 35; Ibid. 153; 1 Kent's Com. 461; 12 John. R. 175.

36. The most natural and genuine way of construing a statute, is to construe one part by another part of the same statute, and so that, if possible, no sentence, clause or word, shall be treated as superfluous, void or insignificant, and especially where the two clauses are parts of the same section, inseparably connected with, and necessarily dependent on each other. Kentucky Dec. 301; 4 Gill & J. 1; 22 Pick. R. 571; 1 Harrington R. 285; 4 Blackf. R. 148; 2 Mich. (Gibbs) R. 138; 1 Lou. Ann. R. 162.

37. In construing a statute, courts are to look to the language of the whole act; and if they find in any particular clause, an expression not so broad in its import as those used in other parts of the statute, if, upon a view of the whole act, they can collect the

real intention of the legislature from the broader expressions, it is their duty to give effect to them. 12 Geo. R. 526 ; 2 Scam. R. 223 ; 3 Ibid. 37, 157.

38. If any part of a statute is obscure, intricate or doubtful, the proper way to discover the intention of the legislature is to consider the other parts of the act ; for the words and meaning of one part of a statute frequently lead to the sense of the other. 4 Md. R. 335.

39. The general system of legislation upon the subject-matter may be taken into view, in order to aid the construction of one statute relating to the same subject ; and it is proper to consider other statutes *in pari materia*, whether they be repealed or unrepealed. 3 Mass. R. 17, 296, 418 ; 1 Pick. R. 248 ; 10 Ibid. 235 ; 2 Bailey R. 541, 554 ; Cooke R. 258 ; Bre. R. 185, 213, 243 ; 3 Scam. R. 144 ; 9 Cowen R. 507 ; 5 Monroe R. 157 ; 15 John. R. 380 ; 1 Kent, 433 ; 2 Bibb R. 80, 96 ; 1 Kelly R. 32 ; 3 Zab. R. 143 ; 4 Gilm. R. 221 ; 19 Vermont R. 230 ; 4 Florida R. 445 ; 3 How. U. S. R. 516 ; 12 N. H. R. 284.

40. In the construction of statutes, it is a rule of universal application, that effect must be given to the words used by the legislature, if there be no uncertainty or ambiguity in their meaning. 4 M'Lean R. 463.

41. Where words in a statute are express, plain and clear, they ought to be understood according to their natural and genuine signification, unless by such exposition a contradiction or inconsistency would arise, by reason of some prior or subsequent clause, and it should thence appear that the intention of the legislature was different. 2 Md. R. 111.

42. The natural import of the words of any statute according to the common use of them, when applied to the subject-matter of the act, is to be considered as expressing the intention of the legislature, unless the intention so resulting from the ordinary import of the words be repugnant to sound, acknowledged principles of national policy. If that intention be repugnant to such principles, then the import of the words ought to be enlarged or restrained, so that it may comport with those principles, unless the intention of the legislature be clearly and manifestly repugnant to them. 7 Mass. R. 523.

43. When terms of act or peculiar phrases are made use of, it must be presumed that the legislature had in view the subject-matter about which such terms or phrases are commonly used. 1 Pick. R. 261.

44. In construing an ordinary statute, every word must be understood according to its legal meaning, unless the context shows that the legislature used it in its more popular sense; but in penal enactments, where it is sought to depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a larger or more popular sense, must plainly appear. 18 Eng. Law & Eq. R. 50.

45. Words are to be understood according to the most known and popular use of them. 1 Kent, 46; 9 Cowen R. 506; 1 Bl. Com. 60.

46. And in a lawful and rightful sense. Co. Litt. 381, b.

47. Also according to their context. 1 Bl. Com. 60.

48. And the subject matter of the statute. 1 Bl. Com. 60.

49. But technical words are to be understood in their technical sense. 1 Bl. Com. 60 ; 1 Kent, 462 ; 4 Pick. R. 411 ; 1 Wash. C. C. R. 463 ; 3 Ibid. 209 ; 5 East. R. 10 ; 5 Humph. R. 392.

50. In the construction of a statute, a word which has two significations, should ordinarily receive that meaning which is generally given to it in the community ; but when this construction would contravene the manifest intention of the legislature, this rule must be departed from, and effect given to the intention of the law. 22 Ala. R. 621.

51. The words of a statute ought not to be expounded to destroy natural justice. Dwarris, 726.

52. Where terms, or modes of expression, are employed in a new statute, which had acquired a definite meaning and application in a previous statute on the same subject, or one analogous to it, they are generally supposed to be used in the same sense ; and, in settling the construction of such new statute, regard should be had to the known and established interpretation of the former. 20 Vermont R. 49 ; 3 Zab. R. 143.

53. If the language in different portions of a statute is inconsistent, it should be so construed as to accord with the leading object of the enactment. 1 G. Greene R. 325.

54. When the words of the enacting clause of a statute are more general than the title, the enacting clause must govern. 9 Howard U. S. R. 351.

55. General words in a statute are to receive a general construction, unless there is something in the statute to restrain their operation. 12 Geo. R. 526 ; 6 Shepley R. 308.

56. The rule that general and unlimited terms are

restrained and limited by particular recitals, where used in connection with them, does not require the rejection of them entirely, and it is to be taken in connection with other rules of construction, such as that an act shall be so construed as to carry out the declared intention of the legislature. 2 Strobhart R. 474.

57. If a statute makes use of a word, in one part of it, susceptible of two meanings, and in another part, it is used in a definite sense, it is to be understood throughout in the latter sense, unless the object to which it applies, or the connection in which it stands, requires it to be differently understood in the two places. 1 Harrington R. 285.

58. If a statute, which grants a right or privilege, admits of two interpretations, one of which is extensive, and the other more restricted, so that a choice is fairly open, and either may be adopted without violating the apparent object of the grant—and if, in such case, one interpretation would render the grant entirely inoperative and worthless, while the other would give it force and effect, the latter should be adopted. 2 Gilm. R. 198.

59. General words in a statute do not ordinarily bind the sovereign power; the State is bound only by express words, or necessary implication. Crabbe R. 307; 11 Co. R. 66; 7 Monroe R. 443; 7 Iredell R. 48.

60. Where a statute speaks of *persons*, natural persons alone are intended. Bre. app. 10; 1 Scam. R. 178.

Contra.—It will include corporations, if not inconsistent and absurd. 15 John. R. 358; 11 Whea. R. 392; 8 Porter R. 404. This is expressly declared in the *dictionary* clause of the Illinois statute. R. S. 1845, p. 472, Sec. 29.

61. A law which in general terms speaks of plaintiffs and defendants, applies to persons only, and States, counties, and municipal corporations, are not affected by its provisions, unless expressly named and brought within them. 4 Gilm. R. 20.

62. Statutes treating of inferior persons or things, cannot be extended to those of a superior order or dignity. 1 Bl. Com. 88 ; Bre. 295 ; 1 Scam. R. 140.

63. On subjects relating to courts, process, practice, etc., the legislature are to be considered as speaking technically, unless from the statute itself, it appears that they used the terms in a more popular sense. 4 Pick. R. 405.

64. A statute applicable in terms to particular actions cannot be extended by implication so as to embrace others standing upon the same reason. 1 Brock. R. 523-4 ; 4 Gilm. R. 207.

65. The term "void" has sometimes been construed to be voidable only. 13 Mass. R. 515 ; 6 Pick. R. 483.

66. The relative "which" and the adjective "said" were held to refer to the *last* antecedent, and not to include a clause or word *preceding the last*. 4 Foster R. 9.

67. The word "such," when it is apparent that it has no reference to any thing which precedes it, may be rejected. 5 Missouri R. 91.

68. A conjunction clause may be taken in a disjunctive sense, when it is obvious that such was the intention of the legislature. 19 Vermont R. 131.

69. The words "shall forfeit," vest only a right or title, and not the freehold in deed, or in law, without office to find the certainty of the land. Dwarris, 743 ; Pl. Com. 486.

70. Affirmative words in a statute may be con-

strued as a negative of that which is not affirmed. 5 Texas R. 418.

71. No mere misnomer of a person or corporation in a statute is fatal to its validity, if the person or corporation really intended can be collected from the terms of the act. 3 Sumner R. 279.

72. Where words in the same section or statute, are clearly repugnant to and irreconcilable with each other, the last will supersede the first. 1 Swift's Dig. 12; 1 Bl. Com. 89; Smith's Com. 673.

73. Where words have no signification, or a very absurd one, if taken according to their literal acceptation, then it is necessary to deviate from the common sense of the words, and construe them in such manner as will result in a rational and consistent meaning. 1 Swift's Dig. 12.

74. The general words in one clause of a statute, may be restrained by particular words in a subsequent clause; but if a particular thing be given or limited in the precedent part of a statute, this shall not be taken away or altered by any subsequent general words. 8 Mod. R. 8; 1 Lev. 80; 1 Swift's Dig. 12.

75. The meaning of a word may be ascertained by reference to the meaning of words associated with it. "*Noscitur a Sociis.*" 3 T. R. 87; Broom's Max. 450; 1 Vermont R. 225; 1 B. & C. 644; 13 East R. 531; 4 Bacon's Works, 26; 2 Bulstrode's R. 132; 2 Bing. R. 391; 4 T. R. 227; Smith's Com. 655-8.

76. "It is, in my opinion," observes Mr. Justice Coleridge, in a recent case, "so important for the court, in construing modern statutes, to act upon the principle of giving full effect to their language, and of declining to mould that language, in order to meet

either an alleged inconvenience, or an alleged equity, upon doubtful evidence of intention, that nothing will induce me to withdraw a case from the operation of a section which is within its words, but clear and unambiguous evidence that so to do is to fulfill the general intent of the statute, and, also, that to adhere to the literal interpretation, is to decide inconsistently with other and overruling provisions of the same statute. When the evidence amounts to this, the court may properly act upon it; for the object of all rules of construction being to ascertain the meaning of the language used, and it being unreasonable to impute to the legislature inconsistent intents upon the same general subject-matter, what it has clearly said in one part must be the best evidence of what it has intended to say in the other; and if the clear language be in accordance with the plain policy and purview of the whole statute, there is the strongest reason for believing that the interpretation of a particular part, inconsistently with that, is a wrong interpretation. The court must apply, in such a case, the same rules which it would use in construing the limitations of a deed; it must look to the whole context, and endeavor to give effect to all the provisions, enlarging or restraining, if need be for that purpose, the literal interpretation of any particular part." 6 A. & E. 7; S. C., 33 E. C. L. R.; Broom's Leg. Maxims, 253-4.

77. Where a word is evidently omitted by mistake in one section of a statute, which omission is explained in another part of the same statute by a reference to such section, the defective section may be enforced according to such explanation. 2 Kelly R. 143.

78. The word *may*, is imperative, where the rights and interests of the public are concerned, or where the public or third persons have a claim *de jure* that the power should be exercised, or the duty performed. 4 Gilm. R. 20; 5 J. C. R. 101; 5 Cowen R. 195; 14 S. & R. 429; 1 E. C. L. R. 46; 1 Peters' R. 46; 1 Saund. R. 58 n. 2; 2 Salk. R. 609; Cro. Eliz. 655; Cro. Jac. 134.

79. Where a statute makes no exceptions, the courts can make none. 25 Miss. R. 571.

80. The exception of a particular thing or person, or class of things or persons, from the general words of a statute, proves that, in the opinion of the legislature, the thing or person, or class of things or persons, would be within the general clause but for the exception; and the exception of the one specifically is an exclusion of every other object embraced in the general words. Marsh. Dec. 360; 12 Whea. R. 438; 12 John. R. 290; 15 Ibid. 391.

81. A statutory rule must be construed with reference to the whole system of pleading and practice of which it forms a part. 14 Geo. R. 674.

82. The punctuation of a statute will not vary its true construction or sense. 1 Ohio R. 385.

83. The debates in the legislative body cannot influence the construction of a statute. 3 Howard U. S. R. 1.

84. A recital in the preamble of a statute, does not limit the general words of the enacting clause to the cases recited in the preamble. Hardin R. 335. Thus, the Illinois statutes of February 23, 1819, entitled "an act to enable persons to remove fences made by mistake on the lands of other persons," is preceded by this preamble: "Whereas, in many parts

of this State there is much prairie, and the lines run by the United States are not well known to the inhabitants even who bought the lands enclosed by said lines, and frequently the inhabitants have made their fences on the lands of other persons by mistake." The law then provides in substance, that when such mistake is discovered upon an official survey of the boundary, the right of removing the fence may be exercised by the party who erected it. This law is held to apply as well to timber as prairie lands. Gale's Stat. 433.

85. In construing a revised code of laws, they are to be considered as cotemporaneous acts, parts of one entire system of law. 1 Chipman R. 348.

86. The common law relative to any subject is superseded by a revision of the whole of that subject by the legislature. 10 Pick. R. 37.

87. Where in the revision of statutes, by incorporating several former statutes into one, the construction of the words would give a meaning clearly at variance with the intention of the legislature, the true construction may be arrived at by giving such words the meaning in which they were used in the old statute. 3 Zab. R. 180.

88. Where a provision in a statute has received a judicial construction, and is afterwards inserted in another statute, the same construction will be given to it. But if the clause varies, it shows a different intent on the part of the legislature. 1 Pick. R. 154 ; 5 Mass. R. 462.

89. Where a statute law, previous to a revision, is settled, either by clear expressions in the law itself, or by adjudications, a mere change in the phraseology shall not be deemed a change of the old law, unless the language of the revising statute shows an inten-

tion on the part of the legislature to effect such change. 2 Caines Ca. 151; 4 John. R. 359; 6 Texas R. 34; 7 Barb. S. C. R. 191; 4 Sand. S. C. R. 374.

90. But where in a revising statute, words in the old law, embracing a particular case or class of cases, are omitted, this is evidence of an intent to change the law. 1 Pick. R. 45; 4 Gilm. R. 207; 31 Maine R. 34.

91. Where the common and statute law conflict, the latter is to be regarded. 1 Bl. Com. 89; 8 John. R. 331; 3 Zab. R. 33.

92. But an affirmative statute does not repeal the common law. There must be negative words or a direct conflict to effect a repeal. 3 Bibb R. 518.

93. Where an old and new statute differ, the latter must prevail. 1 Bl. Com. 89; 1 Ohio R. 10; 2 Carter R. 440; 7 Blackf. R. 314; 14 Illinois R. 106.

94. Courts cannot supply defective enactments, by an attempt to carry out fully the purposes, which may be supposed to have occasioned those enactments. 27 Maine R. 285.

95. A *casus omissus* in a statute cannot be supplied by judicial interpretation. 4 Gilm. R. 208; 14 John. R. 479; 15 Maine R. 167; 6 Pick. R. 362; 9 Porter R. 669; 6 Missouri R. 257; 7 Wend. R. 241; 2 Binney R. 279; 8 John. R. 322.

96. A mere failure of justice is not a sufficient ground for construing statutes against their clear meaning, so as to give a court jurisdiction. 10 Pick. R. 506.

97. Where the reasons of an enactment are made known by any *authentic document*, they may be referred to in construing a statute which is ambiguous. Davies' R. 38.

98. Parties are not estopped from questioning the

truth of recitals in the preamble to a statute. 9 Gill R. 105.

99. Where a positive enactment, contained in a code of laws, is at variance with the dictionary clause of the code, the latter must be regarded as modified by the clear intention of the former. 1 Lou. Ann. R. 435.

100. It is the duty of courts, so far as it is practicable, to reconcile the different provisions of a statute, so as to make the whole act consistent and harmonious; and where this is impossible, to give effect to that which was manifestly the controlling idea of the legislature. 2 Mich. (Gibbs) R. 138.

101. If the meaning of a statute be doubtful, the courts will seek for the meaning of the legislature, by looking at the occasion and necessity of the law, the mischief felt, and the object and remedy had in view. 2 Mich. (Gibbs) R. 486; 4 Comst. R. 140.

102. An erroneous construction merely acquiesced in, but never disputed or judicially litigated, is not binding. Doug. R. 68; 1 Caines' R. 191; 1 Caines' Ca. 54; 1 Scam. R. 165.

103. But the maxim "*communis error facit jus*," is occasionally applied in the construction of statutes. Broom's Leg. Max. 104; 3 Ohio R. 140; 3 Barb. C. R. 528.

104. When the legislature adopt the statute of another State or country, the construction of that statute by the courts of the State or country from whence it was borrowed, will be adopted by the courts. 3 Scam. R. 288; 2 Peters' R. 1; 21 Vt. R. 256; 23 Miss. R. 213; 13 Ill. R. 15.

105. But in matters of practice, the rule is not inflexible. 4 Scam. R. 402; 3 Ohio R. 479-480.

106. Nor where the construction in the foreign

place is not applicable to the condition and mode of practice of the adopting State. 5 Ohio R. 121.

107. Two acts passed at the same session, upon the same subject-matter, must be construed as one act. 3 Monroe R. 80.

108. To constitute a public act, it is not necessary that it should be equally applicable to all parts of the State. It is sufficient, if it extends to all persons within the territorial limits described in the statute. 9 Greenl. R. 54.

109. Or contains provisions in which the public have a direct interest, and which provisions are general in their operation. 2 Greenl. R. 303; 2 Penn. R. 1050; 1 Missouri R. 24; 1 Dev. & Bat. R. 115; 6 Ala.^{*}R. 289; 4 Blackf. R. 234.

110. So where it is recognized in a public act. 2 Greenl. R. 301.

111. Or relates to a public corporation. 7 Mass. R. 9; 10 Ibid. 91; 8 Shepley R. 58; 4 Ibid. 69.

112. Where the means for carrying into effect any particular constitutional power are not specified, those means which interfere with established relations, and violate existing rights and obligations, as fixed by law, will not be presumed to have been intended, unless they are strictly necessary. 24 Pick. R. 227.

113. Statutes which apparently conflict with each other, are to be reconciled, as far as may be, upon any fair hypothesis, and validity given to each, if it can be. 4 Howard U. S. R. 37.

114. The intention of the draftsman of a statute, or of the legislature which passed it, not expressed in the statute itself, affords no legitimate ground to control the judicial construction of it. 3 Zab. R. 180.

115. Where an old statute has received an early

practical construction, which, if it were *res integra*, it might be difficult to maintain, it will be adhered to, especially if great mischief would follow a contrary construction. 2 Mass. R. 475; 17 Ibid. 122; 3 Pick. R. 517.

116. When a known statute is re-enacted in terms, its known interpretation will be presumed to have been adopted by the legislature. 6 Eng. R. 594.

117. Where a statute has received a judicial construction, and is then repealed or expires by its own limitation, and afterwards it is re-enacted in the same terms, the legislature will be held to have adopted such construction. 27 Maine R. 9.

118. Statutes enacted at the same session are to be taken *in pari materia*, and they should receive such a construction as will give effect to each, if possible. 2 Blackf. R. 249; 2 Brock. R. 325.

119. Where two statutes were passed in 1844, on the same day, one limiting a judgment lien to two years, and the other extending it to five years; and a statute passed two years afterwards recognized the former statute as existing and in full force; it was held that it would prevail over the other. 11 S. & M. 43.

120. The decision of a State court, in the construction of a statute of that State, is binding upon the courts of every other State. 3 Strobhart R. 269; 3 Zab. R. 590.

121. In the construction of statutes of other States, judicial decisions in such States are entitled to much attention; but, in the absence of such decisions, such statutes are to be construed in the same manner as acts of our own legislature. 8 Mass. R. 472.

122. A special statute is sometimes regarded as

merged in a general statute passed subsequently, if the provisions of the two are repugnant. 4 Pick. R. 399.

123. Where a statute creates a right, or defines a wrong which had no existence at the common law, and prescribes a remedy to enforce or protect the one, or redress the other, no action will lie at common law — but that provided by statute must be pursued. 23 Pick. R. 36; 3 Metc. R. 380; 1 Ibid. 130, 553; 2 Ibid. 599; 13 Barb. S. C. R. 209; 32 Maine R. 553; 5 John. R. 175; 1 Blackf. R. 405; 7 Hill (N. Y.) R. 575; 1 Manning (Mich.) R. 193.

124. If a statute merely gives a new remedy where one existed at common law, it is cumulative, and the injured party has his election to pursue either. 1 Shepley R. 371; 13 Wend. R. 341; 5 Cow. R. 165; 5 John. R. 175; 10 Ibid. 389; 10 Pick. R. 383; 1 Blackf. R. 405; 2 Caines' R. 169.

125. But if the statute contains negative words, denying or withholding the common law remedy, that provided by statute alone can be resorted to. 1 Shepley R. 371.

126. Where a statute creates an offense, and does not prescribe a mode of prosecution, an indictment, or other appropriate common law remedy, may be adopted. 1 Metc. R. 232; 2 Ibid. 599.

127. Where a statute prohibits the doing of an act, any thing in contravention of the prohibition must be adjudged inoperative and void, if the statute cannot otherwise be made effectual to accomplish the object contemplated by its enactment. 17 Vermont R. 73.

128. But where a penalty is superadded, this implies a prohibition, and renders any act done in

violation of the law void. 1 Story R. 106; 14 N. H. R. 294; 14 John. R. 273; 1 Binney R. 110.

129. In construing a statute, if there be a mistake apparent upon the face of the act, which may be corrected by other language in the act itself, the mistake is not fatal. 3 Sumner R. 279.

130. A statute cannot become obsolete by disuse, or contrary usage, or by any adjudication whatever. 1 Bland R. 550.

131. Statutes are not to be construed retrospectively, unless the intention is palpable. Bre. R. 224, 295; 1 Scam. R. 335; 3 A. K. Mar. R. 138; 5 Monroe R. 129, 140; 4 Burr. R. 2460; 7 John. R. 477; 3 Maine R. 333; 9 Gill R. 105; 1 Denio R. 128; 3 Shepley R. 134; 2 Scam. R. 499; 10 Mass. R. 437; 12 Ibid. 383; 16 Ibid. 215; 14 S. & M. 127; 3 Eng. Law & Eq. R. 30.

132. Nor will a previously existing right or remedy be construed away by implication. Bre. R. 296.

133. Where rights are infringed, fundamental principles overthrown, and the general system of the laws is departed from—the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design on the part of the legislature to effect such objects. 1 Peters' Cond. R. 425.

134. Nor should a statute be construed against the plain and obvious dictates of reason. 7 John. R. 502.

135. Statutes must be so construed as to suppress the mischief, advance the remedy, and preserve fundamental principles. Co. Litt. 381, *b*.; 8 John. R. 41; 10 Ibid. 467.

136. And so that no innocent man be punished or endamaged. 7 John. R. 482, 495-6; Co. Litt. 360, *a*.

137. They are never to be construed so as to work injustice. 7 John. R. 495-6.

138. Nor the destruction of a previously acquired right. 6 John. R. 103 ; 7 Ibid. 503.

139. The province of a proviso to a statute or constitution, is not to enlarge the enacting clause ; it can only restrain, qualify or explain it. 1 Scam. R. 258 ; 4 Ibid. 342.

140. A saving clause, in the form of a proviso, in a statute, restricting the operation of the general language of the enacting clause, is not void, because the language of both clauses is repugnant. 23 Maine R. 360.

141. The terms of a proviso may be limited by the general scope of the enacting clause, to avoid repugnancy. 19 Vermont R. 129.

142. A limitation of an authority to do a thing contained in the proviso to a statute, is a negation thereof. 2 Barr R. 218.

143. Where a statute specifies a time within which a public officer is to perform an official act regarding *private* rights, it is merely directory as to the time within which the act is to be done, unless from the nature of the act, or the phraseology of the statute, the designation of the time must be considered a limitation of the power of the officer. 22 Ala. R. 116 ; *Ante*, pp. 186-7.

144. This rule is alike applicable to *public* interests. 22 Ala. R. 116.

145. In computing time under a statute which requires an act to be performed within a limited time, the day of the date upon which the act is performed, is to be excluded in the computation. 2 Ala. R. 494 ; 6 Shepley R. 106 ; 1 Doug. (Mich.) R. 450.

146. Where a statute uses the word "month," a

lunar month is intended. 3 John. C. R. 74; 6 T. R. 226; 7 John. R. 217; 15 Ibid. 119; 1 John. Ca. 99; 4 Wend. R. 512; Smith's Com. 730. Unless upon the whole law a different intention is apparent. 10 Wend. R. 393; *Ante*, pp. 508-9. In Massachusetts and Pennsylvania, it is held that calendar months will be intended. 2 Mass. R. 170; 4 Ibid. 460; 19 Pick. R. 532; 2 Dall. R. 302; 4 Ibid. 144; 3 S. & R. 184.

147. Where a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way. 6 Mass. R. 40; 14 Ibid. 286; 1 Blackf. R. 39; 1 Missouri R. 428; 1 Ibid. 147; 2 McCord R. 117.

148. Where an act requires a thing to be done in a particular way, that way alone can be pursued. 3 Brevard R. 396; 15 Mass. R. 205; 9 Pick. R. 496; 13 Ibid. 284; 3 Stew. & Porter R. 13.

149. If a power is given by statute, every thing essential to the exercise of that power is impliedly given. 1 McCord R. 546.

150. A statute giving joint power to five commissioners, does not make valid the act of four of them. 1 Bay. 354.

151. Where a statute gives authority to one person expressly, all others are excluded; a *special power* is ever to be strictly pursued. Dwarria, 767; 11 Co. Rep. 59-64.

152. Where a statute enacts that a public functionary may act in a certain way which is beneficial to third persons, he must act in that way. 9 Howard U. S. R. 248.

153. Statutes seemingly repugnant should be so construed, if possible, that both should stand and harmonize with each other. 8 S. & M. 9.

154. Where a statute gives a power to any court

or officer to hear and determine an offense in a summary way, it is necessarily implied and supposed as a part of natural justice, that the party be first cited by summons, and have an opportunity to be heard and answer for himself. Dwarris, 167-8; 1 Hawk. Chap. 64, Sec. 60; 1 Scam. R. 515.

155. Where a statute provides that a criminal prosecution shall be based "*on complaint*," it must be under oath or affirmation — this is implied as a part of the technical meaning of the expression. 4 Shepley R. 117.

156. In a grant by statute, any words which express the intention of the legislature, to invest the party with title, are sufficient. 3 Monroe R. 161.

157. Ordinarily, statutes take effect from their passage, and any act done contrary to the statute, on the day of its passage, will be governed by it, although it was impossible that the existence of the law should have been known at the time and place when and where the act was performed. 8 Ala. R. 119; 8 Geo. R. 380; R. M. Charlton R. 537; 1 Ala. R. 312; 2 Ibid. 26; 1 Scam. R. 555.

158. Where a statute, by its terms, is to take effect "from and after its passage," the courts will inquire into the question as to the precise moment when it received the governor's assent. 1 Cal. R. 406.

159. Where the means for carrying into effect any particular constitutional or statutory power are not specified, those means which interfere with established relations, and violate existing rights and obligations, as fixed by law, will not be presumed to be intended, unless they are strictly necessary. 24 Pick. R. 227.

160. Where the words of a statute, in their primary meaning, do not expressly embrace the case before

the court, and there is nothing in the context to attach a different meaning to them, capable of expressly embracing it, the court cannot extend the statute, by construction, to that case, unless it falls so clearly within the reasons of the enactment as to warrant the assumption that it was not specifically enumerated among those described by the legislature, only because it may have been deemed unnecessary to do so. Where the general intention of the statute embraces the specific case, though it be not enumerated, the statute may, nevertheless, be applied to it by an equitable construction, in promotion of the evident design of the legislature. But when this is done, it is always presupposed that such a case was within their general contemplation or purview when the statute was enacted; for if the case be there omitted, because not foreseen or contemplated, it is a *casus omissus*, and the court, having no legislative power, cannot supply the defects of the enactment. 2 Strobhart Eq. R. 174. The literal interpretation of a statute is not, therefore, always adhered to. The words of the statute are not the only signs of the legislative will. Paley's Works, 26; 4 Litt. R. 377.

161. Cases within the reason — though not within the letter of the law — are sometimes construed to be embraced in its provisions. 4 Litt. R. 377; 7 John. R. 486; 15 Ibid. 381.

162. And cases within the letter, but without the reason, are sometimes withdrawn from its operation. 4 Litt. R. 377; 15 John. R. 381.

163. But this rule is not of general application. 1 Gilm. R. 572; 4 Ibid. 194; 15 John. R. 394; 1 Bibb R. 214.

164. Equitable constructions of statutes are not

tolerated, as a general rule. 10 John. R. 580; 22 Pick. R. 387.

165. But such a construction is occasionally allowable. Co. Litt. 24, *b.*; Ibid. 290, *a.*; 2 B. & P. 255; 10 John. R. 457; 12 Ibid. 290; 14 Mass. R. 88; 1 Pick. R. 248; 12 Mass. R. 383.

166. Thus, it has been extended so as to embrace persons not named. Co. Litt. 272; Ibid. 290, *a.*

167. And to actions not named. Co. Litt. 365, *b.*

168. And to another form of conveyance than those enumerated. Co. Litt. 365, *b.*

169. So the generality of words have been restrained by the equity of the statute, and effect given to rights opposed to the letter of the law. Co. Litt. 290, *a.*

170. It is only when statutes are ambiguous in their terms, that the courts exercise the power of so controlling the language, as to give effect to what they may suppose to have been the intention of the law makers. 1 Mann. (Mich.) R. 469.

171. A literal interpretation, which would defeat the purposes of a statute, will not be adopted, if any other reasonable construction can be given to it. 20 Ala. R. 54.

172. Where the literal interpretation of a statute would lead to a gross absurdity of restriction, the court will extend its application to cases within the same equity, though at the expense of forcing the construction of the words. 17 Vermont R. 479.

173. If the general meaning and object of a statute should be inconsistent with the *literal import of any particular clause or section*, such clause or section must if possible, be construed according to the spirit of the act; but, to warrant the application of this

rule, the intention of the legislature must be clear and manifest. 1 Pick. R. 248; 10 Ibid. 235; 20 Ibid. 267.

174. Where the manifest intention of the legislature may be gathered from prior existing laws, and from the prevailing tone of other sections of the act, conflicting words may be diverted from their literal meaning, in order to harmonize with more explicit portions; and they may be restrained, enlarged or qualified, so as to give effect to the obvious intention of the legislature. 1 G. Greene R. 325.

175. Every statute must be construed so as to give it a reasonable effect. 3 Mass. R. 523; 5 Ibid. 380; 7 Ibid. 458; 15 Ibid. 205; 2 Pick. R. 571; 23 Ibid. 93.

176. And it is the duty of courts to put such a construction upon statutes, if possible, as to uphold and carry them into effect. 10 Geo. R. 190.

177. Such a construction as will defeat the purpose of the law must never be given to it. 9 Whea. R. 81.

178. Courts ought not so to construe a statute as to suffer it to be eluded. 15 John. R. 381.

179. A fraud upon, or evasion of a statute, will not be tolerated. 9 John. R. 356; 10 Ibid. 461; 15 Ibid. 510.

180. A statute shall never have an equitable construction to overthrow an estate. Dwarris, 729; Kentucky Dec. 301.

181. A statute which takes away the common law, ought not to receive an equitable construction. Dwarris, 729.

182. Equitable constructions, though they may be tolerated in remedial, and, perhaps, some other statutes, should always be resorted to with great caution, and never extended to penal statutes, or mere

arbitrary regulations of public policy. 22 Pick. R. 387; *Ante*, p. 78.

183. An act confirming and quieting the title of *bona fide* purchasers, ought to be liberally construed. 15 John. R. 114.

184. A statute treating of superior courts, cannot be extended to those of inferior dignity. 15 John. R. 243.

185. A toll-bridge charter was so construed as to secure to the corporation their legal tolls, and protect those who used it from imposition. 7 John. R. 185.

186. Declaratory or explanatory statutes are construed according to the *letter* of them. 7 John. R. 497.

187. So are statutes which take away or clog a common law remedy. 7 John. R. 497; 10 Ibid. 580.

188. So of a statute which takes away a remedy given by a prior statute. 7 John. R. 497.

189. Acts of incorporation are to be construed favorably to the public at large, and most strongly against the corporators. 2 New Jer. R. 623; Bre. app. 10; 2 Cowen R. 419.

190. They will not be extended beyond their express words, or their clear import. 7 Geo. R. 221.

191. In expounding remedial statutes, the courts will extend the remedy as far as the words will admit, upon a liberal construction. 7 Ohio R. 247; 6 T. R. 429; 1 Md. Ch. Decis. 342; 2 N. J. R. 623; 9 Geo. R. 253; 1 Penn. R. 211; 1 Ham. R. 256, 385, 481; 2 Ibid. 74; 1 Barb. S. C. R. 65; 3 Mass. R. 254; 4 Ibid. 439.

192. But where the language of the statute is clear, direct and positive, leading to no absurd results, and affording a suitable remedy for an existing evil,

courts are to be governed by the obvious meaning and import of its terms, and not to extend its operation because they suppose the legislature intended to give a more effectual remedy. 3 Kelly R. 146.

193. In construing a remedial statute, which has for its end the promotion of important public objects, a large construction is to be given, when it can be done without doing actual violence to its terms. This rule was laid down in reference to the laying out of public highways under a general statute. 19 Conn. R. 597.

194. Statutes of limitation are to receive a liberal construction. 4 Whea. R. 207; 3 Mass. R. 206; 1 Pet. R. 351; 3 Ibid. 278-9; 3 Wend. R. 189.

195. The statute of frauds is to be construed liberally and beneficially. Co. Litt. 268, *b.*; 1 Bl. Com. 88; 4 Cranch R. 224.

196. Revenue statutes are to be construed most favorably to the citizen. Dwarris, 743, 749; 10 Wend. R. 186; 9 Pick. R. 414; 8 Geo. R. 30; 1 Dev. & Bat. Eq. R. 218; Dudley R. 132. *Contra.*—1 Speers' R. 343; 2 Monroe R. 27; 1 McMullen R. 421; 2 Story R. 369; 4 Florida R. 402.

197. Penal statutes are to be construed *strictly*. 1 Bl. Com. 88; 5 Whea. R. 76, 94, 96; 2 Ibid. 119 121; 2 John. R. 379; 4 Mass. R. 473; 2 Cowen R. 419; 6 Ibid. 567; 7 Ibid. 252; 2 Mass. R. 512; 4 Binney R. 13; 3 Burr. R. 1284; 2 Strange R. 1105; 2 Scam. R. 461, 561; 2 N. H. R. 623; 20 Ohio R. 7; 8 Pick. R. 370, 514; 1 Penn. R. 210; Minor R. 143; 6 Greenl. R. 268; 4 Conn. R. 61; 18 Ala. R. 687; 3 Hill (S. C.) R. 96; 8 Porter R. 564; 2 Story R. 202; 1 Ibid. 251; 12 N. H. R. 255; 6 W. & S. 269.

198. But the plain and manifest intention of the legislature ought to be regarded. 13 John. R. 498 ; 5 Whea. R. 76, 94.

199. And a statute which is penal as to some persons, may be equitably construed, provided it is generally beneficial. 13 John. R. 497 ; Co. Litt. 54, *b*.

200. The rule requiring penal statutes to be construed strictly, means only that they are not to be so extended, beyond the legitimate import of the words used in them, as to embrace cases or acts not clearly described by such words, and so as to bring them within the prohibition or penalty of such statutes. 19 Conn. R. 292.

201. But this rule does not apply to a case where the party has a remedy at common law, and the statute merely gives an increase of damages. 10 Missouri R. 781.

202. If a statute be both penal and remedial, it is to be construed strictly. 9 Shepley R. 541.

203. A statute which creates a right of action in an individual, or a particular class of individuals, is not penal, but remedial. 12 Geo. R. 104.

204. Statute of costs construed strictly. 2 Strange R. 1105 ; 3 Burr. R. 1284-7 ; 4 Binney R. 13 ; 2 Mass. R. 512.

205. A statute which extends human liberty is to be liberally construed, but a statute which restrains it, is to be strictly construed. 1 Bl. Com. 88, *note* ; 12 John. R. 373 ; 4 Shepley R. 255.

206. Statutes authorizing suits against the State, are to be *liberally* construed. 7 Eng. R. 321.

207. Statutes of a local character, which refer to persons, places or things, unless otherwise expressed, are to be confined to such persons, places and things, as existed at the time of their passage. 2 Ohio R. 7.

208. Laws exempting property from taxation, are to be construed strictly. 19 Ohio R. 110; *Ante*, p. 481.

209. Laws which have reference to the public welfare, or the policy of a State, are to be liberally construed. 4 Florida R. 445.

210. Statutes giving summary remedies, are to be strictly construed. Dudley R. 105; 7 Blackf. R. 556.

211. Statutes against frauds, are to be liberally construed, in suppression of the frauds prohibited. Dudley R. 182.

212. Where a statute requires a thing to be done in a particular way, that way alone must be pursued. 3 Brevard R. 306.

213. Where a statute prescribes the form of any order, or summary proceeding, it must be followed as far forth as is consistent with the nature and exigency of the particular proceeding. 22 Wend. R. 132; 1 East R. 64.

214. Private statutes, conferring new and extraordinary powers of a special nature, upon particular persons, affecting the property of individuals, should receive a strict interpretation. Dwarris, 750.

215. A statutory power, derogatory to private property, ought to be construed strictly, and not enlarged by intendment. Dwarris, 750.

216. A statute which takes away the right of trial by jury, ought to receive the most strict construction. Dwarris, 749.

217. If a statute provide a remedy unknown to the common law, and by which no notice to the person proceeded against is required, it will be strictly construed. 1 Cal. R. 162.

218. Statutes giving jurisdiction to inferior courts are to be construed strictly. 3 Yerger R. 62.

219. Statutes which are in derogation of the common law, and which have the effect to divest or affect the title to real estate, are to be strictly construed. 2 Mich. (Gibbs) R. 486.

220. A statute which authorizes a court "to render such judgment as substantial justice shall require," means, that the court shall render substantial legal justice, ascertained and determined by fixed rules and positive statutes, and not the abstract varying notions of equity entertained by each individual or judge. 1 Cal. R. 94.

221. The power to take land for public purposes is in derogation of the common law, and is to be construed strictly. 4 Hill R. 76, 92.

222. Statutes which impose restrictions on trade or common occupations, or which levy an excise or tax upon them, must be construed strictly. 9 Pick. R. 412.

223. Statutes which for any cause, disable persons of full age and sound mind to make contracts, are to be construed strictly; for though founded in policy and a just regard to the public welfare, they are in derogation of private rights. 3 Pick. R. 229.

224. In enforcing a summary remedy given by a statute, it must be strictly pursued. 7 Blackf. R. 556.

225. Laws conferring bounties are to be construed liberally. 1 Peters' R. 655.

226. Where particular powers are granted to a company or corporation, if they enter upon any man's land, they must clearly show their authority; and if the words of the statute upon which they rely, are ambiguous, every presumption is to be made against the company or corporation, and in favor of private property. Dwaris, 750.

227. A statute giving to an association power to

hold land, is to be construed liberally. 2 Edwards' Ch. R. 304.

228. If a statute be so defectively drawn, that in one part it appears that it is to be executed in a summary manner, and in another part in the usual way, the latter is to be preferred. 3 Caines' R. 259.

229. Statute provisions for indemnity for losses sustained by one citizen, by means of special privileges conferred by the legislature upon another citizen, ought to receive a liberal construction in favor of the citizen damnified. 2 Pick. R. 33; 2 Mass. R. 33.

230. Private statutes made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction result from express words, or from necessary implication. 4 Mass. R. 140; 2 Ibid. 143; 3 Ibid. 263; 7 Ibid. 393.

231. Where the words of a statute, prescribing compensation to a public officer, are loose and obscure, and admit of two interpretations, that which is most favorable to the officer should be adopted. 3 Story R. 87.

232. Statutes made relative to the administration of justice, are to be liberally construed for the attainment of that important object. 1 Gill R. 66.

233. Statutes in favor of particular persons or corporations, are to be construed strictly. 3 Kelly R. 31.

234. Attachment laws to be strictly construed. 1 Morris R. 97, 456.

235. A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is directory merely, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designa-

tion of time must be considered as a limitation of the power of the officer. *Ante*, pp. 186-7.

236. It has been resolved, that, for the true and sure interpretation of all statutes, be they penal or beneficial, restrictive of or enlarging the common law, four points are to be considered: 1. What was the common law before the making of the act; 2. What was the mischief and defect for which the common law did not provide; 3. What remedy the parliament hath resolved and appointed to cure the disease of the Commonwealth; and, 4. The true reason of the remedy;—and then the office of the judges is always to make such construction as shall suppress the mischief, and advance the remedy. Smith's Com. 660; 3 Co. R. 7.

237. There is a known distinction between circumstances which are the essence of the thing required to be done by a statute, and clauses merely directory. 1 Burr. R. 447; 1 Swift's Dig. 13. This distinction is fully explained in Chapter 14, *Ante*, p. 305.

238. If a statute repealing another be afterwards repealed, the first statute is revived without any express words, by mere implication. 1 Swift's Dig. 13; 1 Inst. 315; 1 Bl. Com. 90; Broom's Max. 27.

239. Statutes at variance with the laws of God, are void. 1 Bl. Com. 58; Broom's Max. 58; Doct. & Stud. 15; Dwarria, 642; 2 B. & C. 471.

240. *Epressio unius est exclusio alterius*. The express mention of one thing implies the exclusion of another. Co. Litt. 210, *a*.; Broom's Max. 505.

241. Where a statute is passed for the benefit of a railway, canal or other company, it is regarded as a *contract* between a company of adventurers and the public, the terms of which are set forth in the act,

and the rule of construction in all such cases is fully established to be, that any ambiguity in the law of the contract, will operate against the adventurers, and in favor of the public, the former being entitled to claim nothing which is not clearly given by the act. 2 B. & Ad. 793; 2 Scott N. R. 226, 370; Ibid. 228; 11 East R. 685; 3 Scott N. R. 803; 6 Ibid. 831; 1 My. & K. 165; 4 M. & W. 482; Smith's Com. 650; Broom's Max. 7.

242. A statute is not to be nullified because some of its provisions are absurd, repugnant or untrue; it should be so construed as to make it effective, rather than destroy it. If enough remains, after rejecting the parts which are inappropriate, to show what the legislature intended, this will suffice. 6 Hill (N. Y.) R. 616; 2 Rolle R. 127; Hobart R. 93-7; 10 Co. R. 57; 1 Pick. R. 105.

243. Sometimes the makers of a statute put the strongest cases, and, by construction, the lesser shall be included: here the cases are put by way of example, and not as excluding other things of a similar nature. Where, moreover, the words are general, and a statute is only declaratory of the common law, it shall extend to others besides the persons or things named. Sometimes, on the contrary, the expressions used are restrictive, and intended to exclude all things which are enumerated. Thus, where certain specific things are taxed, or subjected to any charge, it seems probable that it was intended to exclude every thing else, even of a similar nature, and, *a fortiori*, all things different, in genus and description, from those which are enumerated. So, too, where a general act confers immunities which expressly exempt certain persons from the effect and operation

of its provisions, it excludes all exemptions to which the subject might have been before entitled at common law ; for the introduction of the exemption is necessarily exclusive of all other independent extrinsic exceptions. 3 Bing. N. C. 85 ; 5 M & S. 240 ; 3 T. R. 442 ; 5 Ibid. 21 ; 2 East R. 166 ; 7 T. R. 60 ; 5 East R. 478 ; Dwarris, 712 ; Smith's Com. 655.

244. In construing a doubtful clause in a statute, it will often be a question whether the clause be a substantive independent clause, or only a qualification of an antecedent one. It is difficult to lay down any precise rule applicable to all such cases. But when a section is by way of proviso, or in the nature of an exception, it must be regarded as dependent, unless a manifest intent, apparent upon an examination of the entire act, forbids it. Smith's Com. 711.

245. A saving clause must relate to a thing *in esse*. The nature of a saving clause is to preserve a *former* right, and not to create a *new* one. It may restrain or qualify the purview, or body of the act, but is never allowed to overturn or enlarge it. Smith's Com. 711.

246. There is a known distinction in law between an exception in the enacting and in the proviso clause of a statute. If in the former, it must be negatived in pleading — if in the latter, it need not be. Smith's Com. 712 ; Dwarris, 661 ; 1 T. R. 114 ; 8 T. R. 542 ; Fost. 430 ; East P. C. 167.

247. Where it is apparent that a statute, in the delegation of a power, reposes a special trust and confidence in the appointee of it, it cannot be delegated. 11 Co. R. 64 ; Smith's Com. 713 ; 26 Wend. R. 485.

APPENDIX.

FOR the convenience of the profession, and with a view to the completeness of this work, the author appends an abstract of a tax title, which, he trusts, will be acceptable, especially to conveyancers. The law of Illinois, enacted February 26, 1839, is the basis of the abstract, and that is selected because it is more familiar. The bar and conveyancers will be enabled to obtain from an abstract founded upon that statute, the general requisites of such a document. Nothing more can be expected, inasmuch as the abstract must vary according to the provisions of the respective statutes under which the tax sales may have been made.

ABSTRACT

OF *A Tax Title* TO LOT 1, BLOCK 1, IN THE ORIGINAL PLAT OF THE CITY OF CHICAGO, ILLINOIS, ACQUIRED UNDER A SALE MADE MAY 18, 1840, FOR THE TAXES OF 1839.

1. John Doe was appointed assessor of the justice's district, within which the lot in question was situated, by the County Commissioners' Court of Cook County, at the March term thereof, 1839, and on the 8th day of March, took and subscribed the following oath of office, to wit :

STATE OF ILLINOIS, }
COOK COUNTY, } ss.

I, John Doe, do solemnly swear that I will faithfully and impartially perform the duties required of me as assessor of taxable property in the County of Cook, according to the best of my skill and judgment.

Subscribed and sworn to before me,
this the 8th day of March, 1839.

LOUIS D. HOARD,

JOHN DOE.

Clerk of the Circuit Court of Cook County, Illinois.

March 9, 1839, the clerk of the County Commissioners' Court delivered to the said assessor an abstract of the taxable lands in the said assessor's district.

May 1, 1839, the said assessor returned to the county clerk his assessment list, in substance as follows, to wit :

"List of Property in the First District, in the County of Cook, with the Names of the Owners, and the Value of the Property, assessed by John Doe, for the year 1839."

Owner.	Description.	Valuation.	Remarks.
John Jones.	Lot 1, Block 1, original plat, Chicago.	\$2000.00.	

May 1, 1839.

JOHN DOE,

Assessor of District No. 1, Cook Co., Illinois."

2. March 8, 1839, Richard Roe was appointed collector of the County of Cook, by the county commissioners, and took and subscribed the oath, and executed and delivered the bond required by law.

3. The County Commissioners' Court of Cook County, at the June term, 1839, by an order of record, levied a tax of four mills on each dollar's worth of taxable property in the county.

4. The amount of tax charged upon the lot in question, for the year 1839, was as follows, viz.:

Valuation,.....	\$2,000.00.
State tax,.....	\$4.00.
County tax,.....	8.00.
Total tax,.....	\$12.00.

5. August 20, 1839, the lists of taxable property returned by the assessors, were delivered by the clerk of the County Commissioners' Court, to the collector aforesaid, and a duplicate receipt thereof was filed in the clerk's office. This list is a transcript of the assessor's return.

6. March 10, 1840, the collector advertised, in the "Chicago Democrat," the delinquent list in the manner following, that is to say:

The caption of the advertisement is in these words, viz.:

"List of lands, and other real estate, situated in the County of Cook and State of Illinois, upon which the taxes remain due and unpaid, for the year herein set forth."

Description.	Owner.	Tax.	Costs.	Interest.	Year for which tax due.
Lot 1, Block 1, original plat, Chicago.	John Jones.	\$12.00	14	16	1839."

• The notice of the collector, appended to the list, is in these words:

"The owners of the lands, and other real estate described in the foregoing list, and all others who may be interested in said property, are hereby notified that I shall, on the first day of the next ensuing term of the circuit court of the said County of Cook, to be holden at the Court House in the City of Chicago on Monday, the first day of May, 1840, make a report of the foregoing list of delinquents, and apply to said court for an order to sell the said lands and other real estate described therein, for the purpose of satisfying the tax, interest and costs charged against the same respectively, and specifically mentioned in the said list; and the said owners, and others interested, are further notified that, on

the second Monday next succeeding the said term of the said court, I shall expose to public sale all of the lands and other real estate against which judgment shall be pronounced by the said court, and for the sale of which such order shall be made, for the amount of taxes, interest and costs due thereon.

RICHARD ROE,

Chicago, March 10, 1840.

Collector of Cook County, Illinois.

To this advertisement is appended a certificate of the printer and publisher of the Chicago Democrat, in these words, viz.:

"I, John Wentworth, printer and publisher of the Chicago Democrat, a weekly newspaper printed and published in the City of Chicago, in the County of Cook and State of Illinois, do hereby certify that the foregoing list, and notice thereto attached, was published in said newspaper on the 10th day of March, 1840; and that the number of said paper in which said list and notice was published, was delivered by carriers, or transmitted by mail, to each of the subscribers to said paper, according to the accustomed mode of business in said office.

JOHN WENTWORTH,

Printer and Publisher of the Chicago Democrat.

Chicago, March 12, 1840."

7. A copy of said advertisement, together with the certificate of the said printer, etc., was filed in the office of the clerk of the said circuit court, May 1, 1840.

8. On the said first day of May, the collector aforesaid made a report of the delinquent list to the said court in these words:

"List of lands and other real estate, situated in the County of Cook and State of Illinois, on which taxes remain due and unpaid for the year herein set forth:

Names of present owner.	Cost.	Interest.	Amount of tax.	Year for which tax is due.	Valuation.	Descript'n.	County.
J. Jones.	14	16	\$12,00	1839	\$2000,00	Lot 1, Block 1, original plat, Chicago.	Cook.

I, Richard Roe, collector within and for said county, do hereby certify that the foregoing is a true copy of the delinquent list, upon which the taxes remain due and unpaid for the year 1839, and that I have been unable to find any personal property belonging to the owners whose names are mentioned in said list, within the said county, of value sufficient to satisfy said taxes, interest and costs, by a seizure and sale thereof.

RICHARD ROE, *Collector.*

9. The said report and certificate of the printer were recorded by the clerk of said court, May 1, 1840.

10. On the 6th day of May, 1840, the said court rendered judgment upon such delinquent list, in these words, to wit:

STATE OF ILLINOIS, }
COOK COUNTY, } SCT.

Whereas, Richard Roe, collector of said county, returned to the circuit court of said county, on the first day of May, 1840, the following tracts and parts of

tracts of land, as having been assessed for taxes by the assessor of said county of Cook, for the year 1839, and that the taxes thereon remained due and unpaid on the day of the date of the said collector's return, and that the respective owner or owners have no goods and chattels within his county, on which the said collector can levy for the taxes, interest and costs due and unpaid on the following described lands, to wit :

Present owner.	Description.	Valuation.	Tax.	Costs.	Interest.	County.
John Jones.	Lot 1, Block 1, original plat of Chicago.	\$2000,00	\$12,00	14	16	Cook.

And whereas, due notice has been given of the intended application for a judgment against said lands, and no owner hath appeared to make defense or show cause why judgment should not be entered against the said lands for the taxes, interest and costs due and unpaid thereon, for the year or years herein set forth : Therefore, it is considered by the court, that judgment be, and is hereby entered against the aforesaid tract or tracts of land, or parts of tracts, in the name of the State of Illinois, for the sum annexed to each tract or parcel of land, being the amount of taxes, interest and costs due severally thereon ; and it is ordered by the court, that the said several tracts of land, or so much thereof as shall be sufficient of each of them to satisfy the amount of taxes, interest and costs annexed to them severally, be sold, as the law directs.

11. The precept issued May 13, 1840, and was in these words :

STATE OF ILLINOIS, }
COOK COUNTY, } SCT.

Whereas, Richard Roe, collector of said county, returned to the circuit court of said county, on the first day of May, 1840, the following tracts and parts of tracts of land, as having been assessed for taxes by the assessor of said county of Cook, for the year 1839, and that the taxes thereon remained due and unpaid on the day of the date of the said collector's return, and that the respective owner or owners have no goods and chattels within his county on which the said collector can levy for the taxes, interest and costs due and unpaid on the following described lands, to wit :

Present owner.	Description.	Valuation.	Tax.	Costs.	Interest.	County.
John Jones.	Lot 1, Block 1, original plat of Chicago.	\$2000,00	\$12,00	14	16	Cook.

And whereas, due notice has been given of the intended application for a judgment against said lands, and no owner hath appeared to make defense or show cause why judgment should not be entered against the said lands for the taxes, interest and costs due and unpaid thereon, for the year or years herein set forth : Therefore, it is considered by the court, that judgment be, and is hereby, entered against the aforesaid tract or tracts of land, or parts of tracts, in the name of the State of Illinois, for the sum annexed to each tract or parcel of land, being the amount of taxes, interest and costs due severally thereon ; and it is ordered by the court, that the said several tracts of land, or so much thereof as shall be sufficient of each of them to satisfy the

amount of taxes, interest and costs annexed to them severally, be sold, as the law directs.

And to which precept this certificate was added :

STATE OF ILLINOIS, } ss.
COOK COUNTY, }

I, Louis D. Hoard, clerk of the Circuit Court, within and for said county, do certify that the foregoing precept is a full and perfect copy of the collector's report of delinquent lands and owners, made to the said court, May 1, 1840, and also the order of the said court thereon.

[SEAL.] Witness my hand and the seal of said court, at the City of Chicago,
this 13th day of May, 1840.

LOUIS D. HOARD, *Clerk.*

12. The sale book relating to this parcel of land is in these words, viz. :

Register of Sales for Taxes on the 18th day of May, 1840.

Owner.	Description.	Valuation.	Tax.	Cost.	Interest.	Total.	Purchaser
John Jones.	Lot 1, Block 1, Orig Plat., Chicago.	\$2000,00	\$12,00	14	16	\$12,30	John Smith.

13. Certificate of sale, dated May 19, 1840, assigned to John Johnson.

14. Tax deed to John Johnson, dated May 20, 1842, in these words :—

"Know all men by these Presents, that whereas, at the May term, 1840, of the Circuit Court of Cook County, a judgment was obtained in said court, in favor of the State of Illinois, against Lot 1, Block 1, Original Plat, Chicago, for the sum of twelve dollars and thirty cents, being the amount of taxes, interest and costs, assessed upon said tract of land for year 1839; and whereas, on the 18th day of May, 1840, I, Richard Roe, sheriff of the county aforesaid, by virtue of a precept issued out of the Circuit Court of the County aforesaid, dated the 13th day of May, and to me directed, did expose to public sale at the door of the court house, in the county aforesaid, in conformity with all the requisitions of the statute in such case made and provided, the tract of land above described, for the satisfaction of the judgment so rendered as aforesaid; and whereas, at the time and place aforesaid, John Smith, of the county of Cook, and State of Illinois, having offered to pay the aforesaid sum of twelve dollars and thirty cents, for the whole parcel, which was the least quantity bid for, the said tract was stricken off to him at that price. And whereas, it appears that the certificate of said purchase has been assigned by the said John Smith to John Johnson. Now, therefore, I, Richard Roe, sheriff as aforesaid, for and in consideration of the said sum of twelve dollars and thirty cents, to me in hand paid by the said John Smith, at the time of the aforesaid sale, and by virtue of the statute in such case made and provided, have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said John Johnson, his heirs and assigns, Lot 1, in Block 1, Original Plat, Chicago. To have and to hold, unto him, the said John Johnson, his heirs and assigns, forever; subject, however, to all the rights of redemption provided by law. In witness whereof, I, Richard Roe, sheriff as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name, and affixed my seal, this 20th day of May, 1842.

RICHARD ROE, [SEAL.]

Sheriff of Cook County, and ex-officio Collector.

This deed was acknowledged before the Clerk of the Circuit Court, May 20, 1842, and duly recorded May 21, 1842.

Ordinarily such an abstract, or one as full, alone can enable counsel to determine the legality of a tax title under the Illinois law of 1839.

The following may be adopted by persons competent to examine a tax title as a shorter form of an

ABSTRACT.

1. John Doe was regularly appointed assessor, and Richard Roe, collector, for the year 1839, each of whom were duly qualified.

2. March 9, 1839, the clerk delivered the abstract to the assessor.

3. List returned by assessor May 1, 1839, regularly authenticated. Valuation \$2000,00.

4. County tax of four mills levied June 6th, 1839.

5. Lists delivered to the collector August 20, 1839 — these regularly authenticated.

6. The advertisement was published in the Chicago Democrat, March 10, 1840, and is in conformity with the law, and regularly certified, with these exceptions: 1. There is no caption to the list. 2. The amount of costs and interest is omitted. 3. The certificate of publication does not show in what paper the list was published. 4. The notice does not show where the sale will be held.

7. Collector's report made May 1, 1840, and is regular, with this exception: it does not show in what county the premises in question are situated.

8. The report and certificate of publication were duly filed and recorded.

9. Judgment rendered May 6, 1840, in due form, except that the time of filing the collector's report is not recited.

10. The precept is dated May 13, 1840, and follows the judgment, with this exception: it omits the recital that the taxes "remained unpaid on the day of the date of the collector's return."

11. The registry of sales shows that the lot in question was struck off to John Smith, May 18, 1840.

12. The deed is in the form prescribed, except it omits a recital of the precept. This deed bears date May 20, 1840, was duly acknowledged and recorded May 22, 1842.

Memo.—The description of the lot and the name of the owner correspond in the abstract, assessor's list, collector's list, advertisement, report, judgment, precept, sale book, and deed, with the exception that the precept omits the words "original plat of Chicago," simply describing the lot as "lot 1, block 1, Chicago."

An accurate conveyancer making such an abstract, will be able, in the above compass, to give all the information necessary to enable counsel to give an opinion upon the question as to the regularity of the tax sale.

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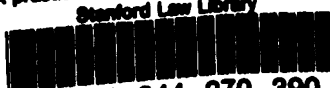
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